

JK

1359

56th

LL8A



Class JK 1359

Book 56th

169 A

CASE OF BRIGHAM H. ROBERTS, OF UTAH.

JANUARY 20, 1900.—Referred to the House Calendar and ordered to be printed.

Mr. TAYLER of Ohio, from the Special Committee on the case of Brigham H. Roberts, submitted the following

REPORT.

[To accompany H. Res. 107.]

Mr. TAYLER, of Ohio, from the Special Committee on the case of Brigham H. Roberts, Representative-elect from the State of Utah, presented the following

REPORT.

Your committee, appointed December 5, 1899, in pursuance of the following resolution—

Whereas it is charged that Brigham H. Roberts, a Representative-elect to the Fifty-sixth Congress from the State of Utah, is ineligible to a seat in the House of Representatives; and

Whereas such charge is made through a member of this House, on his responsibility as such member and on the basis, as he asserts, of public records, affidavits, and papers evidencing such ineligibility:

Resolved, That the question of the prima facie right of Brigham H. Roberts to be sworn in as a Representative from the State of Utah in the Fifty-sixth Congress, as well as of his final right to a seat therein as such Representative, be referred to a special committee of nine members of the House, to be appointed by the Speaker; and until such committee shall report upon and the House decide such question and right the said Brigham H. Roberts shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath in relation to the subject-matter of this resolution—

submit the following report:

The committee met shortly after its appointment, and in Mr. Roberts's presence discussed the plan and scope of its inquiry. Mr. Roberts submitted certain motions and supported them by argument, questioning the jurisdiction of the committee and its right to report against his prima facie right to a seat in the House of Representatives. The determination of these questions was postponed by the committee, to be taken up in the general consideration of the case.

Subsequently certain witnesses appeared before the committee and were examined under oath, in the presence of Mr. Roberts and by him cross-examined, relating to the charge that he was a polygamist. This testimony has been printed and is at the disposal of the members of the House.

The committee fully heard Mr. Roberts and gave him opportunity to testify if he so desired, which he declared he did not wish to do,

and upon the testimony adduced before it, unanimously agrees upon the following

FINDING OF FACTS.

We find that Brigham H. Roberts was elected as a Representative to the Fifty-sixth Congress from the State of Utah and was at the date of his election above the age of 25 years; that he had been for more than seven years a naturalized citizen of the United States and was an inhabitant of the State of Utah.

We further find that about 1878 he married Louisa Smith, his first and lawful wife, with whom he has ever since lived as such, and who since their marriage has borne him six children.

That about 1885 he married as his plural wife Celia Dibble, with whom he has ever since lived as such, and who since such marriage has borne him six children, of whom the last were twins, born August 11, 1897.

That some years after his said marriage to Celia Dibble he contracted another plural marriage with Margaret C. Shipp, with whom he has ever since lived in the habit and repute of marriage. Your committee is unable to fix the exact date of this marriage. It does not appear that he held her out as his wife before January, 1897, or that she before that date held him out as her husband, or that before that date they were reputed to be husband and wife.

That these facts were generally known in Utah, publicly charged against him during his campaign for election, and were not denied by him.

That the testimony bearing on these facts was taken in the presence of Mr. Roberts, and that he fully cross-examined the witnesses, but declined to place himself upon the witness stand.

The committee is unanimous in its belief that Mr. Roberts ought not to remain a member of the House of Representatives. A majority are of the opinion that he ought not to be permitted to become a member; that the House has the right to exclude him. A minority are of the opinion that the proper course of procedure is to permit him to be sworn in and then expel him by a two-thirds vote under the constitutional provision providing for expulsion.

Your committee desire to assert with the utmost positiveness at this point that not only is the proposition of expulsion as applied to this case against precedent, but that exclusion is entirely in accord with principle, authority, and legislative precedent, and not antagonistic to any legislative action which the House of Representatives has ever taken.

For convenience we present herewith, before proceeding to the extended argument in support of the committee's resolution, the following:

SUMMARY.

Upon the facts stated, the majority of the committee assert that the claimant ought not to be permitted to take a seat in the House of Representatives, and that the seat to which he was elected ought to be declared vacant.

The minority, on the other hand, assert that he ought to be sworn in in order that if happily two-thirds vote therefor he may be expelled.

Three distinct grounds of disqualification are asserted against Roberts.

I. By reason of his violation of the Edmunds law.

II. By reason of his notorious and defiant violation of the law of the land, of the decisions of the Supreme Court, and of the proclamations of the Presidents, holding himself above the law and not amenable to it.

No government could possibly exist in the face of such practices. He is in open war against the laws and institutions of the country whose Congress he seeks to enter. Such an idea is intolerable. It is upon the principle asserted in this ground that all cases of exclusion have been based.

III. His election as Representative is an explicit and offensive violation of the understanding by which Utah was admitted as a State.

THE PROPOSITION OF EXCLUSION.

The objection is made to the refusal to admit Roberts that the Constitution excludes the idea that any objection can be made to his coming in if he is 25 years of age, has been seven years a citizen of the United States, and was an inhabitant of Utah when elected, no matter how odious or treasonable or criminal may have been his life and practices.

To this we reply:

1. That the language of the constitutional provision, the history of its framing in the constitutional convention, and its context clearly show that it can not be construed to prevent disqualification for crime.

2. That the overwhelming authority of text-book writers on the Constitution is to the effect that such disqualification may be imposed by the House, and no commentator on the Constitution specifically denies it. Especial reference is made to the works of Cushing, Pomeroy, Throop, Burgess, and Miller.

3. The courts of several of the States, in construing analagous provisions, have with practical unanimity declared against such narrow construction of such constitutional provisions.

4. The House of Representatives has never denied that it had the right to exclude a member-elect, even when he had the three constitutional requirements.

5. In many instances it has distinctly asserted its right so to do in cases of disloyalty and crime.

6. It passed in 1862 the test-oath act, which imposed a real and substantial disqualification for membership in Congress, disqualifying hundreds of thousands of American citizens. This law remained in force for twenty years, and thousands of members of Congress were compelled to take the oath it required.

7. The House in 1869 adopted a general rule of order, providing that no person should be sworn in as a member against whom the objection was made that he was not entitled to take the test oath, and if upon investigation such fact appeared, he was to be permanently debarred from entrance.

THE PROPOSITION OF EXPULSION.

The interesting proposition is made that the claimant be sworn in and then turned out. Upon the theory that the purpose is to permanently part company with Mr. Roberts, this is a dubious proceeding. Such action requires the vote of two-thirds of the members. We ask

if such a vote is possible or right, in view of the following observations.

The expulsion clause of the Constitution is as follows:

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

No lawyer can read that provision without raising in his own mind the question whether the House has any power to expel, except for some cause relating to the context? The ablest lawyers, from the beginning of the Republic, have so insisted, and their reasoning has been so cogent that these propositions are established, namely:

1. Neither House of Congress has ever expelled a member for acts unrelated to him as a member or inconsistent with his public trust and duty as such.

2. Both Houses have many times refused to expel where the guilt of the member was apparent; where the refusal to expel was put upon the ground that the House or Senate, as the case might be, had no right to expel for an act unrelated to the member as such, or because it was committed prior to his election.

The most notable instances are the following:

IN THE SENATE.

1. The Humphrey Marshall case in 1796. Much dispute has arisen as to the ground upon which the Senate refused to expel. The fact remains, however, that he was charged with the commission of an offense—a grave offense in the State of Kentucky—unrelated to him as a Senator, and the report of the committee embodied the proposition that the Constitution did not give jurisdiction to the Senate to expel him.

2. The case of John Smith arose in 1808. He was charged with participation in Aaron Burr's conspiracy. The Senate refused to expel.

3. In 1893 an effort was made in the Senate to expel William N. Roach, a Senator from North Dakota. He was charged with having committed a felony some years prior to his election. The case was elaborately argued on both sides, the objection to his expulsion being grounded upon the proposition that in such case the Senate had no right to expel. The subject was dropped. Those who were prosecuting the effort to expel him discerning, no doubt, that the Senate would never expel under such circumstances.

IN THE HOUSE OF REPRESENTATIVES.

1. O. B. Matteson had committed a grave offense during the Thirty-fourth Congress. He was elected to the Thirty-fifth Congress and was permitted to take his seat without objection. A resolution of expulsion was introduced and referred to a committee, which reported that the House had no authority to expel, because his offense was committed while in a previous Congress. The House sustained the committee.

2. In the case of Oakes Ames and James Brooks, the special committee reported in favor of expulsion. The Judiciary Committee reported against it, on the ground that the House had no authority to expel for acts committed before that Congress. The House refused to expel, and merely censured.

3. In the case of George Q. Cannon, Delegate from Utah in the Forty-third Congress, 1874 and 1875, we find a series of events suggesting, in the light of this case, how history repeats itself.

Cannon's seat was contested by Maxwell, who had received but a handful of votes, and had no right whatever to the seat, even if Cannon was not entitled to it. The claim was made that Cannon was a polygamist. There was no evidence at that time before the House that he had married a plural wife after the act of 1862. If he had not, he had violated no law. A resolution was adopted declaring that he was entitled to the seat as Delegate, the claim being made that he might be proceeded against in expulsion proceedings. Whereupon, on the same day, May 12, 1874, a committee was appointed to investigate the question of Cannon's polygamy and the right of the House to expel. It reported in January, 1875, that Cannon was a polygamist, and brought in a resolution of expulsion. A vigorous minority report was filed, in which the right of expulsion was combated on three grounds.

First. That the House had already declared that Cannon was *entitled* to the seat. The force of the argument was apparent, for nothing had intervened to make him any less entitled then than on the day his title was confirmed by the previous action of the House.

Second. That when Utah was created as a Territory Congress knew it would send Mormon delegates, and it ought not now to complain that a Mormon had come to the House.

Third. That a graver ground of objection existed. "The question is," said the report, "whether the House ought, as a matter of policy, or to establish a precedent, expel either a Delegate or Member on account of alleged crimes or immoral practices unconnected with their duties or obligations as Members or Delegates, when the Delegate or Member possesses all the qualifications to entitle him to his seat."

The reasoning of the committee and the cogent force of an unbroken line of precedents against expulsion seem to have profoundly impressed the House, for when a couple of weeks later the case was called up and the question of consideration raised, only a beggarly twenty-one could be found ready to take up the case and it was never heard of again.

Thus ended the first campaign to confirm a polygamist in his seat in the fond hope that he might later be expelled.

4. The next is the case of Schumaker and King in connection with the China mail service, August 9, 1876. The Committee on the Judiciary submitted a report, in the course of which it asserted that the House of Representatives had no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. Referring to the constitutional provision respecting expulsion, it says:

This power is evidently given to enable each House to exercise its constitutional function of legislation unobstructed.

The committee recommended that the House leave the charges against Schumaker and King "where they are now," in court.

The minority report did not combat the position of the majority, in so far as this case is concerned. They say that—

They do not deny but that there are limitations on the power of this House [to expel] arising from the circumstances of particular cases and the relations of this House to the constituency of an accused member; therefore, as will be seen, the undersigned need not go further in this case than to assert jurisdiction, because the offenses complained of were not known to the constituents of the members in question until after their election.

If there is any fact apparent in *this* case it is that the constituents of Mr. Roberts knew all about him before his election.

Can there be room to doubt the proper action of the House? Is it prepared to yield up this salutary power of exclusion? Will it declare itself defenseless and ridiculous?

Nor are those who assert that expulsion is the remedy necessarily barred from voting for the resolution declaring the seat vacant. He must, indeed, be technical and narrow in his construction of the Constitution who will not admit that if a vote to declare the seat vacant is sustained by a two-thirds majority the Constitution is substantially complied with. He may not agree with the committee that a mere majority can exclude, but he can reserve the right to make the point of order that the resolution is not carried if two-thirds do not vote for it.

ARGUMENT.

Under the form in which the resolution was submitted to the committee two questions appear:

FIRST. As to the *prima facie* right of the member-elect from Utah to be sworn in; and

SECOND. As to his final right to a seat in the House.

FIRST. AS TO THE PRIMA FACIE RIGHT.

Upon this question little need be said except what is hereafter said in relation to the final right to a seat. The questions are inextricably interwoven, and for convenience the main body of authority against his *prima facie* right to be sworn in is presented in the argument made against his final right to a seat.

Both Houses of Congress have in innumerable instances exercised the right to stop a member-elect at the threshold and refuse to permit him to be sworn in until an investigation had been made as to his right to a seat. In some cases the final right was accorded the claimant; in many cases it was denied.

This question, as we view it, is always to be answered from the standpoint of expediency and propriety. The inherent right exists of necessity. The danger of disorder and of blocking the way to an organization vanishes in view of the proper procedure. The most strenuous objection is made by those who imagine, for instance, that if the person whose name was first called should be objected to, he might refuse to stand aside until the remaining members were sworn in. The claim is made that this must inevitably result in confusion and demoralization, and in furnishing an opportunity for an arbitrary and unjust exercise of power on the part of the House.

The answer to this is that every person holding a certificate, whose name is on the Clerk's roll, where it is placed by operation of law, is entitled to participate in the organization of the House, whether sworn in or not. Such is the effect and the only effect of the certificate. If the members elect, other than the person objected to, desire so to do they can prevent his being sworn in. This lodges no more power in the majority, however arbitrary it may be, than that majority always has, whether on the day of the organization or a week or a month thereafter.

The fear that injustice may be done by it in time of great party excitement is not justly grounded in theory, nor has it occurred in practice; while on the other hand injustice has often occurred in the unseating of members in case of contested elections. It is always, whether at the threshold or after the House is fully organized, a question of the power of the majority. It is no more dangerous or disorganizing in the one instance than in the other. There can be no injustice done when every man holding a certificate, whether sworn in or not, is entitled to vote for a speaker, and upon the right of every other member-elect to be sworn in.

If, by way of illustration, Mr. Roberts had been the first person whose name was called, and he had objected to standing aside, the House, for the purpose of organization, and for the purpose of voting upon the question as to whether he should then be sworn in, would be completely organized, and every other member present, although not one of them had been sworn in, would be entitled to vote upon that question. This, it seems to us, dissolves every imagined difficulty and permits the easy organization of the House.

If every individual member had been objected to, *seriatim*, the only objectionable result would have been the inconvenience and delay involved in the time necessary to vote upon all the cases.

Judge McCrary's statement (sections 283 and 284 in his work on Elections) is a sound and correct declaration of the law applicable to the right of the House to compel a member who is objected to to stand aside, and not permit him to be sworn in until his case is investigated. It is as follows:

If a specific and apparently well-grounded allegation be presented to the House of Representatives of the United States that a person holding a certificate of election is not a citizen of the United States, or is not of the requisite age, or is for any other cause ineligible, the House will defer action upon the question of swearing in such person until there can be an investigation into the truth of such allegations.

It is necessary, however, that such allegations should be made by a responsible party. It is usually made, or vouched for, at least, by some member or member-elect of the House. It is to be presented at the earliest possible moment after the meeting of the House for organization, and generally at the time that the person objected to presents himself to be sworn in. The person objected to upon such grounds as these is not sworn in with the other members, but stands aside for the time being, and the House, through its committee, will with all possible speed proceed to inquire into the facts.

The certificate of election does not ordinarily, if ever, cover the grounds of the due qualifications of the person holding it. It may be said that by declaring the person duly elected the certificate by implication avers that he was qualified to be elected and to hold the office. But it is well known that canvassing officers do not in fact inquire as to the qualifications of persons voted for; they certify what appears upon the face of the returns and nothing more.

This is not quoted as being authoritative in itself, but because it is an exact statement of what the precedents and authorities on that subject clearly disclose.

SECOND. AS TO HIS FINAL RIGHT TO A SEAT.

Three main grounds are asserted for the exclusion of Roberts from membership in the House.

I. He is disqualified by reason of his violation of the Edmunds Act and the declared policy of disqualification in section 8.

II. He is disqualified because for years he has been living in open, flagrant, and notorious defiance of the statutes of Utah and in open,

flagrant, and notorious defiance of the statutes of Congress—of the very body which he now seeks to enter; in defiance of the law as declared by the Supreme Court of the United States, and in defiance of the proclamations of Presidents Harrison and Cleveland. He has persistently held himself above the law. This is disloyalty in its very essence. In the language of Chief Justice Waite, in the Reynolds Case, this would in effect “permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”

III. His election as Representative is an explicit and most offensive violation of the understanding by which Utah was admitted as a State. It is an act of unmatched audacity, the possibility of which could no more have been considered when the State of Utah was admitted than that a specific permission would have been given to renew the practice of polygamous marriages.

To deny him admission now would be to do precisely what Jeremiah M. Wilson advised Congress it could do and ought to do when he was advocating, in behalf of the people of Utah and the Mormon Church, the admission of Utah under the constitution of 1887. This constitution had a similar provision to that of 1895, and in his printed brief Judge Wilson said that if the contract was violated—

You could shut the doors of the Senate and the House of Representatives against them; you could deny them a voice in the councils of the nation, because they had acted in bad faith and violated their solemn agreement by which they succeeded in getting themselves into the condition of a State.

INTRODUCTORY.

This question meets us at the threshold: Does the constitutional provision, “No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen,” preclude the imposition of any disqualification by Congress or by either House?

Must it be said that the constitutional provision, phrased as it is, really means that *every* person who is 25 years of age, and who has been for seven years a citizen of the United States, and was, when elected, an inhabitant of that State in which he was chosen, is eligible to be a member of the House of Representatives and must be admitted thereto, even though he be insane, or disloyal, or a leper, or a criminal?

Is it conceivable that the Constitution meant that crime could not disqualify? The whole spirit of government revolts against any such conception.

Not now discussing the question as to whether or not that constitutional provision is exclusive, so far as ordinary qualifications are concerned, is it to be said that there is in it no implied power of *disqualification* for reasons which appeal to the common judgment of mankind, and which are vital and essential to the very constitution and integrity of the legislative body as such?

We are compelled to answer that that provision, in the sense to which we have just adverted, is not exclusive, and that reasonable disqualifications may attach to certain individuals, which may, for the sake of argument, be assumed to amount in practice to added qualifications.

A marked distinction is to be made between arbitrary disqualifications and those which arise out of the voluntary act of the individual

who places himself, by the commission of an offense against the law or civilization, within the prohibited class. We believe, whatever general statements may have been made by public men, that no commentator on the Constitution, no court, or either House of Congress has ever questioned the propriety of that distinction, but that the contrary doctrine has been universally held wherever the question was clearly raised.

In our opinion it is demonstrable that no such exclusive meaning can be given to the provision above quoted as is contended for on the other side of this proposition, and that the sound rule is declared by Burgess in his work on Political Science and Constitutional Law when, on page 52, he says:

I think it certain that either House [of Congress] might reject an insane person
* * * or might exclude a grossly immoral person.

We desire at the very threshold of this discussion to lay down these general propositions, never to be forgotten and always to be kept clearly in mind:

1st. *That the House has never denied that it had the right to refuse to permit a member-elect to be sworn in, although he had all of the three Constitutional qualifications.*

2d. *That it has in many instances affirmatively declared that it had the right to thus refuse.*

3d. *That the right to so refuse is supported on principle, and by the overwhelming weight of authority of constitutional writers and judicial opinions on analogous constitutional questions; and*

4th. *Upon the converse proposition of admission and then expulsion we assert this:*

1st. *That the House has never declared that it had the right to expel a member for acts unrelated to him as such, or for acts committed prior to his election; and*

2d. *That both the House and the Senate have in many instances refused to expel members where the proof of guilt was conclusive, but where the acts complained of were unrelated to the members as such.*

THE STATUS OF THE CLAIMANT.

Let us see in what attitude and status the claimant appears and claims the right to be sworn in. No appreciative opinion as to his status can be formed without some knowledge of the judicial and statutory characterization of his offense.

Section 5352, passed by Congress in 1862, declared:

Every person having a husband or wife living who marries another, whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years.

It did not, however, make unlawful the practice of polygamous living.

There was no pretense of obedience to this law in Utah, the claim being made that it was unconstitutional because an interference with the religion of the Mormons. There is no doubt but that a large body of the Mormons, not only those who practiced polygamy but those that did not, believed that the act of 1862 was an unconstitutional infraction of their rights.

In 1878, however, in the case of *Reynolds v. The United States* (98

U. S., 145) the Supreme Court held that section 5352 was "in all respects valid and constitutional." So that after 1878 no man in Utah could claim that the practice of polygamy was right as related to the laws of the land without doing violence, not only to the statute, but to the unanimous opinion of the highest court of the land.

The opinion in this case was by Chief Justice Waite, and in the course of it polygamy receives judicial characterization as follows: we think it highly important to quote it because it is a judicial declaration and leads us up to a proper recognition of Mr. Roberts' status:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.

By the statute of James I the offense was made punishable by death.

It is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration of the bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I, death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy and polygamy be punishable by the laws of this Commonwealth." From that day to this we think it may safely be said there never has been a time in any State of the Union where polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity.

And, continuing the quotation:

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people to a greater or less extent rests. Professor Lieber says polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle can not long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound.

Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

So also in *Murphy v. Ramsey* (114 U. S., 45). Construing the Edmunds Act, Justice Matthews says:

Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. *And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.*

How cogent and prophetic are these words. How applicable to this situation; that all political influence ought to be withdrawn from those practically hostile to the establishment of a "Commonwealth on the basis of the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony."

There was no machinery for enforcing the act of 1862 until 1882, when Congress passed what is known as the Edmunds law. This act defined and punished bigamy and polygamy in the same terms as the

act of 1862, but also punished unlawful cohabitation, and declared ineligible for office any person who maintained the status of a polygamist or who cohabited with more than one woman.

Section 8 of that act is as follows:

That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust, honor, or emolument in, under, or for such Territory or place, or under the United States.

This law had not only the force of a public law, but it was the outcome of years of agitation and reflection. It crystalized the sober sense of the American people; it represented the settled views of our wisest and most conservative statesmen and later received the stamp of approval from the Supreme Court of the United States in many well-considered cases.

Prior to 1882 Brigham H. Roberts had married one Louisa Smith. She has borne him six children, and is still living.

About 1885, when Utah was fairly ringing with the blows of the Edmunds Act of 1882; while numerous prosecutions were going on and after the Supreme Court had passed upon the validity of the act; when the American people supposed that polygamy had received its deathblow; when no man of the many whose cases went to the United States Supreme Court pretended that the provisions against polygamous marriages were invalid, with all these facts insistently before him, Brigham H. Roberts took another wife—his first polygamous wife—Celia Dibble by name, who in the following twelve years, bore him six children.

This second wife he married in defiance of the Edmunds law. He spat upon that law; he declared by his act that he recognized no binding rule upon him of a law of Congress; he declared by it that he recognized a higher law. The Congress of the United States was to him an object of contempt. The Supreme Court of the United States might declare the law for others, but not for him. He laughed at its futile decrees and spurned its admonitions. The Executive which had declared in solemn messages its gratification that polygamy seemed gone forever he defied and despised. Of what consequence to him were laws of Congress and declarations of the highest court and proclamations of Presidents as against his sensual interpretation of a sensual doctrine?

And all the time the Edmunds law declared not only polygamy but cohabitation with more than one woman unlawful. Roberts not only bigamously married a second wife, but he persisted in violating and defiantly trampling under foot every other provision of the act.

But he had not yet sufficiently proclaimed his utter contempt for the Supreme Court, for Congress and its most solemn enactments. A few years later he took a third wife.

From the time of his second marriage to the third he cohabited with two women. From the date of his third marriage down to his election, and, we doubt not, to the present time, he has been cohabiting with three women.

As recently as December 6, 1899, he defined his position as follows:

These women have stood by me. They are good and true women. The law has said I shall part from them. My church has bowed to the command of Congress and relinquished the practice of plural marriage. But the law can not free me from obli-

gations assumed before it spoke. No power can do that. Even were the church that sanctioned these marriages and performed the ceremonies to turn its back upon us and say the marriages are not valid now, and that I must give these good and loyal women up, I'll be damned if I would.

In this statement he adheres to the audacious assumption that the law of 1882 did not speak to him and that he did not recognize it as a rule of conduct to him.

The amnesty proclamation of 1893 and 1894 never embraced him. There was never a moment when its provisions were complied with by him. There has never been a moment since he married Celia Dibble down to the present moment when he has not been a persistent, notorious, defiant, demoralizing, audacious violator of every provision of the State and Federal law relating to polygamy and its attendant crimes. And this is the man who seeks admission to this body.

It was declared in the Kentucky cases, and in the Thomas case in the Senate, and in the Test Oath Act of 1862 that disloyalty created ineligibility; that fidelity to the Constitution was a necessary qualification to membership in this body. What is loyalty? It is faithfulness to the sovereign or the lawful government. A mere violator of the law may not necessarily be disloyal. One may violate the law and still recognize the sovereign and the lawfulness of the government. His only concern may be that he shall not be found out and punished. But that man is surely disloyal, and in the fullest sense disloyal, when by his words, his acts, and his persistent practices he declares unequivocally in this wise: "You have solemnly enacted certain laws; you have crystallized into statute the will of the sovereign people. I bid defiance to your law. I will not recognize it. I here and now before your very eyes do the things you say I shall not do. I recognize a higher law than your man-made law—no law of yours can relieve me from the obligations which I thus take in defiance of your enactments. The only thing I promise not to do is to take a fourth wife."

The case of a bribe taker, or of a burglar, or of a murderer is trivial, is a mere ripple on the surface of things, compared with this far-reaching, deep-rooted, audacious lawlessness.

What was the case of Whittemore, who was excluded, as hereafter set out? He had not been convicted of any crime, but a committee had found that he had sold a cadetship. He did not pretend that he was wiser or greater than the people, or that he had the right to sell cadetships and was above the law. The acts of Roberts are essentially disloyal. They deny the sovereign; they repudiate the lawful government. Look at them from whatever point you will, they are subversive of government. They do not merely breed anarchy, they are anarchy.

We observe that this is not a moral question. It goes to the root of our own constitutional government. What we have just quoted from Justice Waite and Justice Matthews are as much a part of our Constitution as the written instrument itself.

THE DUTY AND POWER OF THE HOUSE.

We have thus presented to our view the status of Roberts. What are we going to do about it?

We assert that it is our duty, as it is our right, to exclude him; to prevent his taking the oath and participating in the councils of the nation.

Three methods present themselves by which to test the soundness of this view:

FIRST. On principle, and this involves—

(1) The nature of the legislative assembly, and the power necessarily arising therefrom;

(2) The express language of the constitutional provision;

(3) The reasons for that language;

(4) Its context and its relation to other parts of the instrument;

(5) The obvious construction of other portions of the same instrument necessarily subject to the same rule of construction.

SECOND. The text-books and the judicial authorities.

THIRD. Congressional precedents. These are of two classes—

(1) Action respecting the rights of individual members;

(2) Acts of Congress and general resolutions of either house.

FIRST.—*On principle.*

As to the first proposition, what is the argument on principle? We think it will be undoubted that every legislative body has unlimited control over its own methods of organization and the qualifications or disqualifications of its members, except as specifically limited by the organic law. We do not think that this proposition needs amplifying; it is axiomatic. It is apparent that every deliberative and legislative body must have supreme control over its own membership, except in so far as it may be specifically limited by a higher law; there is a distinction to be drawn between the legislative power of a legislative body and its organizing power, or those things which relate to its membership, and its control over the methods of performing its allotted work. That is to be distinguished from the legislative power to be expressed in its final results.

When our Constitution was framed there was practically no limit to the right and power, in these respects, of the English Parliament. Such power is necessary to the preservation of the body itself and to the dignity of its character. In England it was at one time admissible to permit the admission into the House of Commons of minors, of aliens, and of persons not inhabitants of the political subdivision in which they were elected. To this day it is well known that an inhabitant of London may be elected by a Scotch constituency, and a member has been elected by more than one constituency to the same Parliament.

The framers of the Constitution, familiar with these facts, proposed to prevent their happening in this country. They knew also that a similar latitude of choice had been exercised in the original colonies and in the States of the Federation, and it was proposed to put a stop to it so far as Congress was concerned. A very luminous argument was made on this subject by John Randolph in the House of Representatives in 1807.

We quote as follows from his remarks:

If the constitution had meant (as was contended) to have settled the qualifications of members, its words would have naturally run thus: "Every person who has attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives." But so far from fixing the qualifications of members of that House, the constitution merely enumerated a few disqualifications within which the States were left to act.

It is said to the States, you have been in the habit of electing young men barely of age; you shall send us none but such as are five and twenty. Some of you have elected persons just naturalized; you shall not elect any to this House who have not been some seven years citizens of the United States. Sometimes mere sojourners and transient persons have been clothed with legislative authority. You shall elect none whom your laws do not consider as inhabitants.

In pursuance of the idea in the mind of the framers of the Constitution, we have the peculiar words "no person shall be a Representative who shall not have attained, etc." How happy indeed are these words if we give them precisely the force and meaning for which we contend. How unhappy and how misleading, how impossible, in fact, to the masters of the English language who wrote them, if they were intended to exclude all other possible requirements or disqualifications. We might admit such construction if suitable language was difficult to find or frame; but note how easily such a purpose could have been served in fewer words and with unmistakable meaning. Thus: "Any person," or "a person," or "every person may be a Representative who shall have attained the age of twenty-five years," etc.

The provision seems to be worded designedly in the negative so as to prevent the suspicion that it was intended to be exclusive, and so as to prevent the application of the rule, "the expression of one thing is the exclusion of another." The immediately preceding clause is affirmative, and says: "The electors in each State shall have the qualifications," etc. With some show of propriety it can be claimed that this provision is exclusive. It at least does not have the negative form to condemn such construction.

Story says (Constitution, sec. 448):

The truth is, that in order to ascertain how far an affirmative or negative proposition excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction. There can be no doubt that an affirmative grant of powers in many cases will imply an exclusion of all others.

It is a notable fact that in the first draft of this constitutional provision which provides for qualifications of Representatives in Congress, the language was affirmative and positive, and that when it was finally presented for adoption it appeared in the form in which we now find it.

The slight contemporaneous discussion in the Constitutional Convention was upon the provision in the affirmative form. Why was it changed in the negative? Surely not for the sake of euphony. And certainly not to make it more explicitly exclusive.

In the report of the committee of detail, submitting the first draft of the Constitution, this section read in the affirmative and as follows:

Every member of the House of Representatives shall be of the age of 25 years at least; shall have been a citizen of the United States for at least three years before his election, and shall be at the time of his election a resident of the State in which shall be chosen.

In the discussion Mr. Dickinson opposed the section altogether, expressly because it would be held exclusive, saying he—

was against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the legislature from supplying omissions.

Mr. Wilson took the same view, saying:

Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters.

The next day after this discussion, and when the clause respecting age, etc., had, in its general sense, been informally approved, a proposed section respecting a property qualification was discussed. Mr. Wilson said (Madison Papers, vol. 5., p. 404) that he thought "it would be best, on the whole, to let the section go out; this particular power would constructively exclude every other power of regulating qualifications." What did Mr. Wilson mean if the result of the discussion in which he participated on the preceding day was to "constructively exclude every other power of regulating qualifications?"

In view of the objections urged by Dickinson and Wilson and their opinions as to the construction that would result and the consequences thereof the conclusion seems reasonable, if not absolutely irresistible, that the change from the affirmative to the negative form was intentionally made, and with the very purpose of obviating such objections, and hence that in being negatively stated it was considered by the convention that the particular qualifications mentioned would not be exclusive and would not render impossible the "disqualifying odious and dangerous characters" and would not prevent "supplying omissions."

This section was finally reported and adopted in the negative form in which it now appears. The report of the committee seems to have been elaborately discussed.

Where do we find ourselves in such a case as this? Suppose that Brigham H. Roberts, instead of being charged with polygamy, was charged with treason, not constructive treason, but actual treason, and suppose that a witness appeared before the committee—a credible witness, whose testimony was undisputed—who testified that he had seen Brigham H. Roberts wage war against the United States in the Spanish war, giving aid and comfort to Spain, not constructively, but actively; and suppose that Roberts appeared himself before the committee and said, "All that this man says is true; I did wage war against the United States; I did give aid and comfort to its enemies in time of war against a foreign foe, and I glory in it." Now, in that state of facts the law could not lay its hand upon him for the crime of treason, for the Constitution provides that no person shall be convicted of treason except upon the testimony of two witnesses to the same overt act or by confession in open court. So that under the state of facts thus presented he could not be convicted of treason.

Suppose he was here with a certificate of election from a great State and demanded admission. Upon the theory of the other side we must admit him. The minority insist that in such a case he must be sworn in. It will not do to say that practically no wrong would be done on the ground or on the theory that he might be immediately thereafter expelled, for he would have a right to be heard in his own defense, he would have a right to be heard as to whether the House had a right upon those facts to expel, and it might take much time. In any event he would be there fully armed with all of the powers and privileges of a member of the American House of Representatives. We think that the civilized world would declare that it made itself ridiculous if it confessed its want of power to keep out from the councils of the nation a man who was a confessed traitor.

Another illustration. Suppose that on the 1st day of January, 1899, two months after his election and two months before his term as a Representative should commence, he had been convicted of the crime

of bigamy or of adultery, either one of which is a felony under the statutes of Utah, for an offense, we will presume, committed prior to his election, so that it can not be charged that after his election he voluntarily put himself in that position, and he was tried, convicted, and sentenced to the penitentiary for a term of two years: and it so occurs that his term of imprisonment should expire on the 3d day of March, 1901, the day before his term as Representative in Congress expires. Suppose he presented himself on the 3d day of March, 1901, no action having been previously taken in his case, would the House have to admit him, or would not the proper proceeding be while he was still in the penitentiary, for such an offense, for the House to declare his seat vacant; that he ought not to have or retain a seat in the American House of Representatives.

It may be said that that imprisonment would amount to a constructive resignation. There is no precedent for that. The Yell case is entirely different. An election was held for a successor to Yell, and the seat was recognized to be vacant upon the express ground that he had taken another office incompatible with his position as a member of Congress, and that since he was occupying and exercising the functions of that office, of course that vacated ipso facto his position as Representative in Congress.

It is well settled that while the mere appointment or election to an office the duties of which are incompatible with those of one already held will not vacate such an office, the acceptance of the incompatible office ipso facto vacates the first office held. This doctrine is laid down in *Willecox*, in *Angel and Ames on Corporation*, section 434; in *Whitney against Canique*, 2 Hill, 93; *Cushing's Law on Practice of Legislative Assemblies*, section 479, and many other authorities.

Let us assume, further, that that sentence of imprisonment would not expire until after the 4th of March, 1901, so that during all of that period Roberts would be incapacitated from being present to demand the right to be sworn in; what is the remedy? We think it clear that the seat is not vacated by the mere fact that he does not present himself; by the mere fact that he remains absent. A man might be sick, and he might remain away the entire session, hoping that he might become well enough to attend, and Roberts might indulge the hope that he would be pardoned, and thus get in. Is it to be said that the House on that state of facts can not declare the seat vacant and permit the governor to issue a new writ and call another election? If it can not, then we are face to face with the proposition that the people of the State must remain unrepresented during the entire term of Congress.

Suppose another case. That in the midst of the organization, and before being sworn in, a member-elect should so indecently and outrageously conduct himself before the eyes of the House and the assembled multitude as to demand and justify expulsion if he had so conducted himself after he had been sworn in. What would the House do? In the midst of his outrageous misconduct must the House, with tender persuasiveness, beg him to honor it by being sworn in so that he may be turned out, or would it refuse to swear him in and proceed to declare his seat vacant? Could the strictest constructionist of the Constitution deny that the Constitution was substantially complied with if he was excluded by a two-thirds vote, even if he did not assent to our view in all respects?

Suppose that the claimant to this seat, while enjoying through the courtesy of the House the privilege of the floor, should declare his contempt for this body and for the Government; that he respected none of its decrees or the laws of the land as having any binding force upon him; that if he became a member of the House he should become so merely for the purpose of obstructing its business and to tear down the Government. What would the House do? Swear him in that it might have the ineffable privilege of turning him out? Or would it declare him unfit to have a seat in that body and declare his seat vacant?

As Judge Shaw says in *Hiss v. Bartlett* (3 Gray, 473), "it is necessary to put extreme cases to test a principle."

So much for illustrations upon that question. Look, now, at the last paragraph of Article VI of the Constitution:

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution.

Here is an affirmative declaration that a certain oath shall be administered to certain officials. If the theory of exclusion is applied to the qualification clause as to Representatives, it must be applied to this clause, and therefore Congress has no power to demand any other oath, or superadd to this oath any other provisions.

And yet the very oath we took as members of this House has additional provisions. Congress passed also the test oath act in 1862, making vital additions to the constitutional oath, and, indeed, adding a new ground of disqualification for members of Congress. This act was passed by a large majority and compelled members of Congress to submit to that oath for many years. Chief Justice Marshall, the great expounder of the Constitution, in the case of *McCulloch v. Maryland*, declared that "He would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution such other oath or oaths as its wisdom might suggest," and the whole opinion in that case is addressed in principle to the very doctrine that is here advocated.

If Congress could add to the constitutional oath, the same theory of construction must permit it to at least add reasonable qualifications to the requirements for members of the legislative body, at least to the extent of declaring disqualifications which in their nature ought to bar a man from entrance into a great legislative body.

The same clause to which we have just referred has this provision:

But no religious test shall ever be required as a qualification to any office or public trust under the United States.

If the Constitution had laid down all the qualifications which Congress or any other power had the right to impose it was unnecessary to go on and declare that no religious test should be required. That great instrument is inconsistent in its parts and contradictory of itself if it be true that it meant that no disqualifications should be provided except those named. Nor was it necessary, if the proviso means an oath merely, that such exception should be made, for the preceding words of the paragraph set out the required oath.

The effort to make the negative declaration of minimum qualifications exclusive of all others, whatever the necessities of the House may

be, falls to the ground if we admit that the paragraph respecting oaths is in the same instrument as that which defines the qualifications of members of Congress.

SECOND.

The text-books.

Let us now proceed with what we have called the text-book and judicial authority.

There is a statement in Story's work on the Constitution to the effect that the clause in the Constitution describing the qualifications for Representatives in Congress would seem to imply that other qualifications could not be added.

Now, whether or not that be sound, these two observations are to be made upon it:

First. That it is dismissed in a very few words. Justice Story himself disclaims explicitly in his work that he gives his own opinion as to what the Constitution means, but asserts that he undertakes merely to give the statements of others.

Second. This statement of Judge Story does not at all interfere with the proposition we have laid down: That the power of the House to exclude from its membership a person who is, for instance, disloyal, a criminal, insane, or infected with a contagious disease is not superadding any qualification, within the meaning of Story, such as a property qualification or an educational qualification.

We find, however, that Story's expression, if it means all that is claimed for it by the minority, does not accord with the opinion of other commentators, with the courts or with the Congressional precedents. We have already quoted and will not now repeat what is said by Prof. John W. Burgess, professor of history, political science, and international law, and dean of the university of political science in Columbia College, New York. This ambitious work, published in 1896, must be considered an authority on the subject of constitutional law.

In Pomeroy's Constitutional Law, 3d edition, page 138, is the following:

The power given to the Senate and to the House of Representatives, each to pass upon the validity of the elections of its own members, and upon their personal qualifications, seems to be unbounded. But I am very strongly of the opinion that the two Houses together, as one House, can not pass any statute containing a general rule by which the qualifications of members as described in the Constitution are either added to or lessened. Such a statute would not seem to be a judgment of each House upon the qualifications of its own members, but a judgment upon the qualifications of the members of the other branch. The power is sufficiently broad as it stands. Indeed, there is absolutely no restraint upon its exercise except the responsibility of the Representatives to their constituents. Under it the House inquires into the validity of the elections, going behind the certificates of the election officers, examining the witnesses, and deciding whether the sitting member or the contestant received a majority of legal votes. The House has also applied the test of personal loyalty to those claiming to be duly elected Representatives, deeming this one of the qualifications of which it might judge.

Pomeroy is discussing the power of the House, not stating what somebody may have said.

So, also, in the lectures of Justice Miller on the Constitution of the United States, page 194, is the following:

Very few controversies, if any, have ever arisen in either body (that is, of Congress) concerning the qualifications of its members. It was at one time a question somewhat mooted whether the States could add to the qualifications which the Constitution has prescribed for the members of the Senate or the House of Representa-

tives, but it is now conceded that this must be decided by the Constitution alone, because, though it might be conceivable that Congress might make some conditions or limitations concerning the eligibility of its members, it has not been done, and the constitutional qualifications alone regulate that subject.

If a profound constitutional authority like Justice Miller had believed that the provision we are considering was absolutely exclusive and prevented the House or the Senate from exerting any such power it seems to us that he would have so declared.

Throop on Public Offices, section 73, says:

The general rule is that the legislature has full power to prescribe qualifications for holding office in addition to those prescribed by the Constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the Constitution.

Who shall say that the exclusion of Roberts on the ground of polygamy is "opposed to the spirit of the Constitution?"

Cushing (Law and Practice of Legislative Assemblies, p. 195, sec. 477) says:

To the disqualifications of this kind may be added those which may result from the commission of some crime which would render the member ineligible.

The Courts.

What have the courts said on similar propositions? We first have the case of *Barker v. The People* (3d Cowen) [New York]. In that case it was held that every person not specifically disqualified by the Constitution was eligible to election or appointment to office. In so far as that particular statement goes, it is a denial of the broad right to superadd to the constitutional provision as to qualifications. But that statement, as applied to this case, loses all of its applicability, for two reasons:

(1) Because it was not the question that it had to decide.

(2) Because the judge distinctly and positively declares—and that was the point involved in the case—that notwithstanding that want of power in the legislature to add to the Constitution qualifications it did have the right to disqualify for crime. He proceeds to say that it might disqualify for crime upon conviction thereof. We apprehend that that is unimportant here, for if the House of Representatives has a right to disqualify for crime it has the power and the right to determine for itself whether the crime was committed, and not to depend upon a judicial conviction. The necessity for a judicial conviction is the more apparent where the person who seeks to take office undertakes to assume an executive office to which he has been elected or appointed, for there may not be any other than the ordinarily constituted court in which to try the question of his guilt of the offense that created his ineligibility.

But it is not the settled doctrine of the law that disqualification for crime must be first adjudicated in the courts. The authorities are, the most of them, against that proposition, and for the sake of convenience we shall refer to them here.

We quote from *Royall v. Thomas* (28 Gratton (Va.), 130). The syllabus is as follows:

Under the constitution and statute of Virginia, a party who has aided and assisted in a duel fought with deadly weapons may be removed from office by proceeding of quo warranto, or if that writ be not in use, by information in the nature of a quo warranto, though he has not been convicted of the offense in any criminal prosecution against him.

The court in this case say that the principal authority relied on in support of the contrary position to that stated in the syllabus is the Kentucky case of *Commonwealth v. Jones*.

It was held in that case that the clause of the Kentucky constitution imposing the disqualification for office of the offense of dueling is not self-executing, except so far as it prevents those who can not or will not take the requisite oath from entering upon office. It was there held that a citizen willing to take such oath could not be proceeded against for usurpation of such office until he had been first indicted, tried, and convicted of the disqualifying offense.

It was found, however [said the Virginia court in the Gratton case], on examination, that much of the reasoning of the court in the Jones case turns upon the peculiar phraseology of the Kentucky constitution, in which it is declared that the offender shall be deprived of the right to hold any office, post, or trust under the authority of the State.

The court agreed that if, instead of the words "shall be deprived" the phrase "shall not be eligible" had been used, some of the difficulties attending the argument to show that the provision is self-executing would have been obviated.

In the case of *Cochran v. Jones*, involving the same question, the board for the determination of contested elections arrived at a very different conclusion upon the same clause of the Kentucky constitution. It will thus be seen that even in Kentucky there is such conflict of opinion in respect to the true interpretation of the constitutional provisions in question as deprives the decision relied on by the defendants of the weight of being considered even persuasive authority.

The provision in the Virginia constitution is as follows: "No person who, while a citizen of this State, has, since the adoption of this constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, shall be allowed to vote or hold any office of honor, profit, or trust under this constitution."

The court goes on to explicitly hold that previous conviction was unnecessary, arguing it with great force.

The same doctrine is held in *Mason v. The State* (58th Ohio State), where Mason, who had been elected probate judge of a county in Ohio, had expended more money to bring about his election than the corrupt practices act allowed, and as this act disqualified such person from holding the position to which he was elected, the supreme court held that he could be thus disqualified and kept out of office without conviction.

To the same effect is the case of *Commonwealth v. Walter* (83 Pennsylvania State, 105).

Proceeding with the enumeration of authorities as to the exclusive effect of the constitutional provision defining or declaring qualifications for office, the next case to which we call attention is *Rogers v. Buffalo* (123 New York). We quote from page 184:

The case of *Barker v. The People* (3 Cowan, 686) has been cited by counsel. That case holds the act to suppress dueling, which provided as a punishment for sending a challenge that the person so sending should, on conviction, be disqualified from holding any public office, was constitutional. The chancellor, in the course of his opinion, said he thought it entirely clear that the legislature could not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution had not required. What he meant by such expression is rendered clear by the example he gives. Legislation would be an infringement upon the Constitution, he thought, which should enact that all physicians, or all persons of a particular religious sect, should be ineligible to hold office, or that all persons not possessing a certain amount of property should be excluded, or that a member of assembly must be a freeholder, or any such regulation.

But, in our judgment, legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor to a general regulation requiring qualifications not mentioned in the Constitution. The "qualifications" which were in the mind of the learned chancellor were obviously those which were, as he said,

arbitrary, such as to exclude certain persons from eligibility under any circumstances. Thus a regulation excluding all physicians would be arbitrary. But would a regulation which created a board of health and provided that not more than one physician from any particular school, or none but a physician, should be appointed thereon be arbitrary or unconstitutional as an illegal exclusion from office? I think not.

The purpose of the statute must be looked at, and the practical results flowing from its enforcement. If it be obvious that its purpose is not to arbitrarily exclude any citizen of the State, but to provide that there shall be more than one party or interest represented, and if its provisions are apt for such purposes it would be difficult to say what constitutional provision is violated, or wherein its spirit is set at naught.

And, again, on page 188—

It is said that the legislature had no right to enact that a person who shall be appointed to a public office shall have the qualifications necessary to enable him to discharge the duties of such office, nor to provide that the fact that he does possess such qualifications shall be ascertained by a fair, open, and proper examination. Nothing but the bare oath mentioned in the Constitution can be asked of any applicant for an appointive office is the claim of the appellant. We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense we are quite sure that the framers of our organic law never intended to impose a constitutional barrier to the right of the people through their legislature to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means to accomplish such end are appropriate therefor they must be within the legislative power.

The idea can not be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own Representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enacted under cover of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people.

And, again, on page 190—

In this case we simply hold that the imposing of a test by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and intelligently perform the duties of such office, violates no provision of our Constitution.

This opinion was delivered by Justice Peckham, now a member of the Supreme Court of the United States.

Another instructive case is that of *Ohio ex rel. Attorney-General v. Covington*, 29 Ohio State, page 102. The opinion is by Judge McIlvaine, one of the ablest and most careful judges that ever sat in the Supreme Court of Ohio. He says:

The last objection made to the validity of this act is based on section 4 of article 15 of the constitution, which declares: "No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector."

The question arises under the fourth section of the act (which the court is construing), which provides: "Each member and officer of the police force shall be a citizen of the United States, and a resident citizen for three years of the city in which he shall be appointed, and able to read and write the English language."

There is no claim made that the qualifications prescribed in the act, in view of the nature of the duties to be performed, are unreasonable, or even unnecessary, to the discharge of the duties. The point made is that disqualifications are imposed by the statute which are not imposed by the constitution.

It is apparent that this statute is not in conflict with the terms of this constitutional provision. It does not authorize the appointment of a person who is not an elector. The express provision of the constitution is that a person not an elector shall not be elected or appointed to any office in this State. Now, unless the clear implication is

that every person who has the qualifications of an elector shall be eligible to any office in this State, there is no conflict between the statute and the constitution. I do not believe that such implication arises. There are many offices the duties of which absolutely require the ability of reading and writing the English language. There are many electors who, from habit of life or otherwise, are wholly unfit to discharge the duties of many offices within this State. If the framers of the constitution had intended to take away from the legislature the power to name disqualifications for office other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration. The power under the general grant being ample and certain, a statute should not be declared void because in conflict with an alleged implication, unless such implication be clear and indubitable.

We find the same doctrine in the case of *Darrow v. The People*, 8 Colorado, page 417. The syllabus relating to this question is as follows:

The statute designating the payment of taxes as a necessary qualification of membership in the board of aldermen is not in conflict with section 6, article 7, of the constitution.

The provision of that section is as follows:

No person except a qualified elector shall be elected or appointed to any civil or military office in the State.

The court says, on page 420, that it is argued that this provision—by implication inhibits the legislature from adding the property qualification under consideration. There is nothing in the constitution which expressly designates the qualifications of councilmen in a city or town, and this section contains the only language that can possibly be construed as applicable thereto. But it will be observed that the language used is negative in form—that it simply prohibits the election or appointment to office of one not a qualified elector. There is no conflict between it and the statute. By providing that a supervisor or an alderman shall be a taxpayer the legislature does not declare that he need not be an elector. Nor is the provision at all unreasonable. On the contrary, it is a safeguard of the highest importance to property owners within the corporation.

The right to vote and the right to hold office must not be confused. Citizenship, and the requisite sex, age, and residence constitute the individual a legal voter; but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office. And certainly no doubtful implication should be favored for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the constitution, by this provision, intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded, and no other qualifications should be imposed.

THIRD. LEGISLATIVE PRECEDENTS.

We proceed now to the legislative precedents upon this matter of exclusion, without admitting the person objected to to be sworn in.

JEREMIAH LARNED.

One Jeremiah Larned, as long ago as 1785, was elected to the legislature of Massachusetts, but it turned out that he had violated a law that that legislature had passed. And what was it? On election day he headed a riot for the purpose of preventing the collection of taxes. What did the fathers of that day do? They were not men who were regardless of human rights; they held that inasmuch as Larned had violated the law he was unworthy to take a seat upon that floor, and they kept him out.

SENATE.

JOHN M. NILES.

In the first session of the Twenty-eighth Congress, on the 30th of April, 1844, the credentials of John M. Niles as a Senator from Connecticut were presented to the Senate and objection was made to the oath being administered. Mr. Jarnagin submitted a resolution referring the credentials of Mr. Niles to a select committee, which was instructed—

To inquire into the election, return, and qualifications of the said John M. Niles, and into his capacity at this time to take the oath prescribed by the Constitution of the United States.

Mr. Jarnagin himself made a speech at that time, in which he took the view that it was a question of eligibility that was raised, and that a man who was insane was ineligible, and of course incapable of taking the oath. There was some discussion about it, and some doubt raised, and Mr. Niles's colleague said he had no objection to the matter going to the committee.

On May 16 following, the committee reported in favor of permitting Mr. Niles to take the oath, which was then administered. It appears from the report that Mr. Niles had been suffering from severe bodily afflictions which impaired his mind to such an extent that he was removed to the insane asylum at Utica, N. Y., where he remained until April 1, 1844, after which he was discharged as improved, but not completely restored to health. The committee reported that while Mr. Niles was laboring under mental and physical disability he was not of unsound mind in the technical sense of that phrase.

If this case establishes anything, it establishes the right of the Senate to protect itself against a person of infirm or unsound mind; that it recognized that it had the right to exclude a person possessed of every qualification which the Constitution required if he was not of sound mind.

PHILIP F. THOMAS.

Another case in the Senate was that of Philip F. Thomas, of Maryland, in the Fortieth Congress. His credentials were presented on March 18, 1867, and the following day were referred to the Judiciary Committee. There was a very elaborate debate.

The charge against him was that he had been disloyal, and that he was therefore incapable of taking the test oath which was provided for in the act of July, 1862.

The resolution which was then adopted, and under the provisions of which Thomas was excluded from the United States Senate, was as follows:

Resolved, That Philip F. Thomas, having voluntarily given aid, countenance, and encouragement to persons engaged in hostility to the United States, is not entitled to take the oath of office as a Senator of the United States from the State of Maryland, or to hold a seat in this body as such Senator, and that the President pro tempore of the Senate inform the governor of the State of Maryland of the action of the Senate in the premises.

The vote for exclusion was 27 to 20. Among those voting in the negative was Lyman Trumbull. He did so because he thought the proof of disloyalty was unsatisfactory.

His position on the question involved had, however, been clearly and unmistakably defined in the case of

BENJAMIN STARK,

who was appointed a Senator from Oregon early in 1862.

There were ex-parte affidavits as to Stark's disloyalty. He was not permitted at first to take the oath, and his case went to a committee, which reported in favor of letting Stark be sworn in, but without passing at all on the facts. The discussion of the case, however, showed that it would be impossible to take proof before the legislature of Oregon elected his successor. The state of the proof was so unsatisfactory also that on the resolution to expel Stark not even a majority voted in the affirmative. On the preliminary question Mr. Trumbull, February 7, 1862, made an able and conclusive report. He said:

It is admitted that neither the Senate, Congress, nor a State can superadd other qualifications for a Senator to those prescribed by the Constitution, and yet either may prevent a person possessing all those qualifications and duly elected from taking his seat in the Senate. Does anyone question the right of a State to arrest for crime a person duly qualified for and appointed a Senator, hold him in confinement, and thereby prevent his appearing in the Senate to qualify? Suppose a Senator, after his appointment and before qualifying, commits the crime of murder, would anyone question the right of the State authorities where the crime was committed to arrest, confine, and, if found guilty, execute the murderer and thereby forever prevent his taking his seat? Or if the punishment for the offense was imprisonment, would anyone question the right to hold the Senator in prison and thereby prevent his appearing in the Senate?

Could the Senate in such a case expel him before he had been admitted to a seat, or must he be brought from the felon's cell, be introduced into the Senate and sworn as a member before his seat could be declared vacant? If not, must the State go unrepresented till the time for which he was appointed had expired? Or would it be competent for the Senate in such a case, by a majority vote, to declare the convict incompetent to hold a seat in the body and thereby open the way for the appointment of a successor? It is manifest that the prescribing of the qualifications for a Senator in the Constitution was not intended to prevent his being held amenable for his crime.

The fact that the Constitution declares that Senators and Representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses, and in going to and returning from the same," is conclusive that for those offenses they may be arrested. As punishment for crime then, it is clear that a Senator-elect, possessing all the constitutional qualifications of age, citizenship, and inhabitancy, may be prevented from taking the oath of office. Congress has repeatedly acted upon the presumption that it was entirely competent for it to prescribe as a punishment for crime and inability forever afterwards to hold any office of honor, profit, or trust under the United States.

By a statute passed in 1790, any person giving a reward to a United States judge as a bribe to procure from him any opinion or judgment, and the judge receiving such bribe, are both declared to be forever disqualified to hold any office of honor, trust, or profit under the United States.

By an act passed in 1853, any member of Congress, after his election, and whether before or after he is qualified, who shall accept any reward given for the purpose of influencing his vote on any question which may come before him in his official capacity, is declared incapable forever of holding any office of honor, trust, or profit under the United States.

He goes further on and says that he shall forfeit his office.

Does anyone doubt the power of Congress, under this clause of the Constitution, to declare that a person convicted of treason should forever be incapable of holding any office under the United States? If this were done, would it be contended that a convicted traitor was entitled to be sworn as a Senator? The clause of the Constitution prescribing the qualifications of Senators and Representatives could never have been intended to limit the power to make disqualifications to hold those or any other offices a penalty for the commission of crime, especially of treason.

Doubtless [he says] a law of Congress declaring that a person convicted of a particular offense should not hold office under the United States, and the decision of the courts sustaining such a law, would not preclude the Senate from admitting such a person to a seat should it think proper, because the Senate is the exclusive judge of the elections, returns, and qualifications of its own members. Yet it is hardly conceivable that the Senate ever would admit such a person to be sworn; nor does the fact that Congress has not adopted such a punishment for disloyalty or treason prevent the Senate from refusing to allow to be sworn as a member a person believed by the body to be guilty of those offenses or other infamous crimes.

That one avowed traitor, a convicted felon, or a person known to be disloyal to the Government has a constitutional right to be admitted into the body would imply that the Senate had no power of protecting itself—a power which, from the nature of things, must be inherent in every legislative body. Suppose a member sent to the Senate, before being sworn, were to disturb the body and by violence interrupt its proceedings, would the Senate be compelled to allow such a person to be sworn as a member of the body before it could cast him out? Surely not, unless the Senate is unable to protect itself and preserve its own order. The Constitution declares “that each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member.”

The connection of the sentence in which the power of expulsion is given would indicate that it was intended to be exercised for some act done as a member and not for some cause existing before the member was elected or took his seat. For any crime or infamous act done before that time the appropriate remedy would seem to be to refuse to allow him to qualify, which, in the judgment of the undersigned, the Senate may properly do, not by way of adding to the qualifications imposed by the Constitution, but as a punishment due to his crimes for the infamy of his character.

There is absolutely no doubt whatever that if the case of disloyalty had been stronger Stark would have been excluded. The weakness of the case in that respect is manifest when we remember that less than a majority voted to expel him.

HOUSE.

KENTUCKY CASES.

On the 3d of July, 1867, the members-elect from the State of Kentucky presented their credentials to the House. They were not then permitted to be sworn in, on the ground that they had been disloyal or had expressed disloyal sentiments.

If there is any criticism to be lodged against the action of the House at that time it is not that the theoretical ground upon which they based their action was untenable, but that they undertook to exercise the power to exclude a man for disloyalty years after he had been disloyal, as alleged, and after the time in which alone he could have been disloyal.

The Committee on Elections, which took jurisdiction of the case under the order of the House, made several reports, all of which were of the same general character and all of which were sustained by the House. The reports were carefully prepared and were most elaborately argued.

From the report filed by Mr. Dawes, as chairman, we quote as follows:

The committee are of the opinion that no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion, ought to be permitted to be sworn as a member of this House, and that any specific and apparently well-grounded charge of personal disloyalty made against a person claiming a seat as a member of this House ought to be investigated and reported upon before such person is permitted to take the seat.

A second report was filed, in which it is said:

The importance and gravity of the questions upon which the committee has been called to act, and the fact that in relation to those questions there are no precedents by which it might be guided in arriving at correct conclusions, have seemed to require that the committee should lay before the House the principles which have determined the character and result of its investigations and deliberations so far as such result has yet been reached.

They follow that with this:

The committee adhere to the views expressed in the former report, that no man who has been engaged in an attempt to overthrow the Government and subvert the Constitution by force of arms, or who has voluntarily given aid, countenance, counsel, or encouragement to persons so engaged, ought to be admitted to a seat in this House to make laws for the nation he has traitorously sought to destroy; and it is apparent that there must be power in this House to prevent this, the House being the judge of the qualifications of its members, of which fidelity to the Constitution is one, and that this end can only be certainly accomplished by the investigating of any specific and apparently well-grounded charge of personal disloyalty made against a person claiming his seat as a member of this House before such person is permitted to take the seat.

The House concurred in this view of the committee by adopting the resolution under which the committee is now acting. The principle upon which this preliminary investigation was ordered was adopted by Congress when the oath of office to be taken by members of this House was prescribed by law, and the preliminary investigation of specific and apparently well-founded charges against a person claiming a seat in this House is only an additional mode of attaining the same result sought to be secured by requiring the oath to be taken by all persons who become members of the House. The same principle has been affirmed by the President of the United States in his annual message, December 4, 1866, in which he says:

“In the admission of Senators and Representatives from all of the States there can be no just ground of apprehension that persons who are disloyal will be clothed with the powers of legislation, for this could not happen when the Constitution and the laws are enforced by a vigilant and faithful Congress. Each House is made the judge of the election, qualifications, and returns of its own members, and may, with the concurrence of two-thirds, expel a member. When a Senator or Representative presents his certificate of election he may at once be admitted or rejected; or, should there be any question as to his eligibility, his credentials may be referred for investigation to the appropriate committee. If admitted to a seat, it must be upon evidence satisfactory to the House of which he thus becomes a member that he possesses the requisite constitutional and legal qualifications. If refused admission as a member for want of due allegiance to the Government and returned to his constituents they are admonished that none but persons loyal to the United States will be allowed a voice in the legislative councils of the nation, and the political power and moral influence of Congress are thus effectively exerted in the interest of loyalty to the Government of the United States and fidelity to the Union.”

This proposition was argued in a letter which was written by Mr. Shellabarger, then a member from Ohio, but unable to be in his seat, and is here quoted:

To the Committee on Elections of House of Representatives.

GENTLEMEN: I have just received the communication of the committee through its clerk, asking that I should communicate to the committee my views as to the right of Mr. Smith and also of Mr. Brown to a seat in the House of Representatives, as shown by the evidence in the case now pending before the committee of *Smith v. Brown*, of Kentucky.

This I proceed very cheerfully to do, regretting that I am deprived of consultations with the committee. In regard to the right of Mr. Brown to this seat, I now state, briefly, my vote and reasons.

I understand that Mr. Brown's right to this seat depends upon the determination of one or more of three questions. First, May a law such as that prescribing the test oath be constitutionally passed and enforced either as to any officer or as to a member of Congress? Is Mr. Brown excluded from this seat by a just construction of a “test oath?” I shall of course not discuss the constitutionality of the law prescribing this oath and qualification, but assume that to be settled as constitutional. To hold that the oath of office required to be taken by Representatives and other offi-

cers named in the sixth article and first section of the Constitution excludes them from being required by law to take any further obligation is, as seems to me, not only in violation of the express terms of the Constitution, but is in the face of both the reason and the practice which construes this section. Such construction is against the text itself of the Constitution, because that prescribes the thing which shall not be required as a qualification for office, to wit, "religious tests." Now surely, if the prescribing of one thing which each member should be required to do and swear was in this case meant to exclude all other requirements, then it was not only useless but calculated to mislead and deceive, to go on and give one and only one qualification as the one which Congress might not require the officer to have. Surely the prescribing of one test as one that may not be required as much proves that any other test may be established as the fixing of one test being required excludes others from being required.

The plain sense, therefore, of this clause is to name one quality which at least every member shall have, and one which at least shall not be required, and to leave the other qualifications to be regulated by the laws of the Government which the Constitution established. If this is not so, and if this clause excludes any officer named in the clause from being required to take any further obligation by his oath of office than that one named in the Constitution, then no State officer named in the same clause could be required to swear to support his State constitution; and no officer, State or Federal, could be required by law to take an oath to discharge well the duties of his office. Plainly this clause is not meant to exclude all other qualifications for Federal office as unconstitutional.

Exactly the same remarks apply to all other clauses touching the qualifications, etc., of officers and members. None of them can be construed to prohibit Congress from excluding from office an open and avowed traitor to his country any more than they can be construed to deny Congress the right to exclude the convicted felon or the insane from such offices. Congress, then, may by law exclude traitors from the offices of the Government, and "each House," if not bound by such law as a law, may and ought at least to adopt such a "law" as a "rule," not to be departed from, as to the qualifications of its members. I therefore hold that the House would do, against its dignity, its purity, its patriotism, and fitness to make laws, an act most monstrous, if not absolutely fatal, did it not, with unremitting vigor and sleepless vigilance, enforce this great act for the exclusion of the Government's enemies from the control of the Government's life; and of course this law, which should have to each House at least the force of an inflexible "rule," should be applied alike in each House.

The only other question, then, is whether Mr. Brown can properly be admitted to take this oath and seat.

In answering this, the principal inquiry in the case, and the one which I think will be of vital importance in the future as it is in the present, I will first of all state what I deem the rule of exclusion from office which this law establishes.

That the act which shall exclude the party from being permitted to take the oath and the office need not be treason, technically, I think, can not be fairly questioned.

The law was passed with the utmost familiarity on the part of every member making it with the technical terms in which the Constitution defined treason. They adopted these constitutional words in the "test oath" and then added to them the words "countenance," "encouragement," "counsel," etc. Plainly, then, other acts against the Government than treason proper were meant to exclude from the Government's offices. To find what is to be the safe, wise, and practical rule of exclusion from office under this important law, to have it adopted by both Houses of Congress and by all departments of the Government, and to make it of perpetual force, is the thing of incalculable importance in the present case—a case probably to become a precedent for all the future.

From time to time after the objection was made to the swearing in of other members-elect, the House assumed jurisdiction, tried the cases in advance of administering the oath, and where, as sometimes had been the case, it appeared that the claimant had not been disloyal he was of course sworn in; in other cases he was excluded.

The following quotation is made from the speech of Mr. Dawes on the Kentucky cases:

[Extract from speech of Mr. Dawes, February 13, 1868. See Globe Appendix, vol. 68, 1868.]

I assume that the gentleman from Kentucky and the gentleman from Indiana would expel a man from this House if he were guilty of treason, although I do not

know that either of them has thus said so in so many words. If I misstate them in this argument I would yield for correction. I assume that both of them would do it. The gentleman from Kentucky (Mr. Beck) put his idea of it in this form:

“The power to expel a member, two-thirds voting therefor, is the only protection (and that is ample) against improper persons under the law holding seats in this body, while the right of a Representative to hold the position to which he has been chosen by his people, unless two-thirds of this House expel him therefrom, is equally clear.”

If he has a right to enter this body notwithstanding his disloyalty, what right have we to expel him afterwards for that disloyalty? And if we have a right to expel him for disloyalty, have we not a right to keep him out for the same disloyalty?

But assuming, Mr. Speaker, that both these gentlemen would expel a man from the House if he were a traitor, I desire to inquire what for? Why would they expel a man from this House if he were a traitor? To punish him? Certainly not; for that is not the punishment prescribed for treason. Is it to overawe and restrain treason? That is puerile and ridiculous. What is it for? There is no other reason assignable except for the public safety. If I misjudge the gentlemen I want to know it. If they would not expel a man for treason from this House, or would not expel him from it because the public safety demanded it, I want to know for what they would expel him? Now, sir, if it is because the public safety demands the expulsion of this man, I would like to inquire if the measure of the danger to the public safety must not govern and limit the means by which you insure that safety? Hamilton says that the means must be adequate to the end. If it is unsafe to trust the life of the nation to the keeping of traitors in this Hall by permitting them to remain in their seats here, is it not equally unsafe to admit them into those seats? Is not the public safety jeopardized by the very means thus resorted to—by the very admission of these men to their seats? If the public safety calls upon us to expel a man after he has put himself into his seat because he has the life of the nation in his keeping, is not the public safety regarded more, is not the public safer, by not letting him into the seat at all? The custody of the citadel is intrusted to your hands. The enemy approaches. You are bound to use all the means that are required to make that citadel safe. Are you to admit the enemy within these walls and then drive him out, or are you rather to consult the highest safety of the citadel itself by keeping him out?

* * * * *

This, sir, is no new proposition. The doctrine that this House has the right and power and duty incumbent upon it to exclude disloyal men from seats on this floor has been held by all men ever since this war ended. All parties have defended it and asserted it. It has been part and parcel of every policy proposed or adopted on all sides of this House. It was proposed in the early part of this attempt to reconstruct and build up States on the ashes of this rebellion.

The President of the United States, in the first message he sent to this House, in the first year of his Administration, in answer and in refutation of the charge against his policy, that it would admit rebels upon this floor, set forth the very proposition now before this House, and called upon us to sustain it. I will read it from his very first message to this House:

“In the admission of Senators and Representatives from all of the States there can be no just ground of apprehension that persons who are disloyal will be clothed with the powers of legislation, for this could not happen when the Constitution and the laws are enforced by a vigilant and faithful Congress. Each House is made the judge of the election, qualifications, and returns of its own members, and may, with the concurrence of two-thirds, expel a member. When a Senator or Representative presents his certificate of election he may at once be admitted or rejected; or, should there be any question as to his eligibility, his credentials may be referred for investigation to the appropriate committee. If admitted to a seat it must be upon evidence satisfactory to the House, of which he thus becomes a member, that he possesses the constitutional and legal qualifications. If refused admission as a member for want of due allegiance to the Government, and returned to his constituents, they are admonished that none but persons loyal to the United States will be allowed a voice in the legislative councils of the nation, and the political power and moral influence of Congress are thus effectively exerted in the interest of loyalty to the Government of the United States and fidelity to the Union.”

There is the identical recognition of authority; and after two years of experience on his part and on the part of Congress in an effort to reconstruct the rebel States he sent into this House, on the 2d of March last, a veto message in which he repeats, word for word, the very language I have read, and it so commended itself to my distinguished friend from Indiana (Mr. Kerr) that he voted to sustain him in it, and so

did all his political friends. Only three or four days since the distinguished Senator from Indiana (Mr. Hendricks), speaking of the law that prescribes the oath of office, used this language:

“As I participated somewhat in the debate on Governor Thomas’s case, and as I was a member of the committee who reported upon that case, perhaps the Senator may refer to my views upon that question; and, if so, he does not correctly state them. My views upon the constitutionality of that law were expressed in the Senate some two or three years ago; but always when the question has been before the Senate I have said this: That while the law remained upon the statute book I would not vote to allow any man to take his seat if in taking that seat he had to swear falsely in that oath; that I thought such a man ought not to be admitted.”

Now, sir, what are the qualifications of a member? The Constitution says:

“No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of that State in which he shall be chosen.”

Here it ends. These qualifications a Representative must have. It speaks of no disqualifications. Do any exist? Can any be created by statute?

I understand the gentleman from Indiana to say there is the beginning and the end of the matter. Suppose an insane man should present himself at the bar of this House, 25 years old, and seven years a citizen of the United States, and a citizen of Kentucky, the gentleman from Indiana would not administer the oath to him. Suppose he were *non compos*; I submit to the gentleman it would be an absurdity, and he would never say in the face of that absurdity, Admit him to take the oath of office. Suppose he attempted to bribe a judge; the act of 1793 states that conviction therefor shall disqualify him. Suppose he had been a member and was convicted of having received a bribe; the statutes of 1853 says that shall disqualify him from taking the seat, though he may be qualified in all other respects.

The act of July 17, 1862, enacts as follows—its last two sections:

“SEC. 2. *And be it further enacted*, That if any person shall hereafter incite, set on foot, or assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have, or by both of such punishments, at the discretion of the court.

“SEC. 3. *And be it further enacted*, That every person guilty of either of these offenses described in this act shall be forever incapable and disqualified to hold any office under the United States.”

And yet the gentleman from Indiana (Mr. Kerr) says that it begins and ends with the three qualifications expressed in the Constitution. You will observe, Mr. Speaker, that this last statute is unlike the two elder ones I have cited. They make conviction work a disqualification. They say that anyone guilty—not convicted of, but guilty—of any of the offenses described shall be forever incapable and disqualified to hold any office under the United States. Why this change? Necessity, the public safety, is the answer. No State that would elect a man to this high trust who had been guilty of these offenses would ever convict him. Therefore if you waited for a conviction you would wait in vain. You would leave the door open, the traitor would enter, and the Government would fall. * * *

Now, sir, to those of us who believe that that fourteenth article is already a part of the Constitution, there is an expressed inhibition upon this man contained in that article. I do not care to take the time of the House in discussing the question whether it is or is not a part of the Constitution. I plant myself upon the Constitution without amendment. I hold that in its lifeblood there is power to protect itself by all means not prohibited and adequate to the end.

As showing that the House in acting in the Kentucky and other cases in the Fortieth Congress was not precipitate and wanting in deliberation, we call attention to the resolution adopted by the House of Representatives on the 22d of March, 1869. This was four years after the war and nearly two years after the Kentucky cases arose, when it may fairly be said that a deliberate judgment had been reached respecting the right of Congress in a proper case to exclude a member-elect.

On the 22d of March, 1869, the following was adopted as the permanent rule of the House:

Resolved, That in all contested-election cases in which it shall be charged by a party to the case, or a member of the House, that either claimant unable under the act approved July 2, 1862, entitled "An act to prescribe the oath of office, and for other purposes," it shall be the duty of the committee to ascertain whether such disability exist, and if such disability shall be found to exist, the committee shall so report to the House and shall not further consider the subject without the further order of the House, and no compensation will be allowed by the House to any claimant who shall not have been entitled at the time of the election, and whose disloyalty shall not have been removed by act of Congress.

This rule, it will be observed, is independent of the mere disqualification for disloyalty, but is intended to exhibit the matured determination of the House of Representatives to insist not only upon the oath required by the act of July 2, 1862, but also that the person claiming the right to take the oath should show his right to do so.

The test-oath act only required that he take the oath, but the House held that it had a right to inquire whether he had the capacity to take the oath, which was an exercise of an original power, not based upon any statute.

WHITTEMORE CASE.

Again, in the Forty-first Congress the House of Representatives asserted its right to exclude from membership a Representative-elect, with a perfect certificate and possessing all of the so-called constitutional qualifications. This is the case of Whittemore, from South Carolina. It must be remembered that Whittemore was a Republican and that he brought his certificate to a Republican House of Representatives. Previously, on the 24th day of February, 1870, he had resigned in order to avoid a vote on a resolution of expulsion which had been reported to the House.

It was charged against him that he had sold a cadetship, and that, therefore, he was unworthy to continue to be a member of the House. His resignation, however, prevented action upon the resolution of expulsion and the House contented itself with the adoption of a resolution of censure. Whittemore returned to his constituency, a special election was ordered, and he was reelected and returned to the same session of Congress with his certificate of election under the broad seal of the State of South Carolina. Objection was made by General Logan, and after some discussion the matter was postponed until June 21. General Logan made a powerful speech, in which he asserted the right to exclude a man guilty of an offense such as Whittemore had committed. In this debate he said, among other things:

It is said that the constituency had the right to elect such a member as they may think proper. I say no. We can not say that he shall be of a certain politics, or of a certain religion, or anything of that kind; but, sir, we have the right to say that he shall not be a man of infamous character. He is not merely a representative of the constituents who elect him, but his vote in the House is a vote for the whole nation. It is a vote for the people of the whole country, and every district in the United States has the same interest in his vote that his own district has. Hence, if Congress shall not have the power or authority or shall not have the right to exclude a man of that kind, then the rights of the people of the whole country may be destroyed by a district sending a representative who may be obtained to vote in a manner which may be destructive to the rights of the people. Are we to be told that Congress has no right to prevent anything of this kind because of the right of any constituency to send whomsoever they please?

*

*

*

*

*

*

*

It is not that the people shall not be represented. Not at all. It is this: That the people of the country have no right to destroy their own liberties by filling Congress with men, who, from their conduct, show themselves capable of the destruction of their Government.

* * * * *

Congress, being the representatives of the whole people, are entitled to say that the rights of the whole country shall not be destroyed by one or more districts throwing in here a man, or set of men, capable of their destruction; and that, having knowledge of the facts, and the power to prevent the mischief by exercising the right of exclusion, they have a right to exercise that power, and thereby protect the interests of the country, and to preserve instead of destroy the right of representation.

* * * * *

For crime, sir, we have a right to proscribe a man. That is the ground I put it on. That is the ground on which I put it first, and that is the ground on which I put it now. We have a right, I say, to protect the interests of the country by excluding men from these halls on the ground of crime. It is not a crime to be a Democrat or Republican, to be a Presbyterian or a Methodist, or a member of any other denomination; but, sir, it is a crime for a man to do what this man has done. And why? Because the laws of our country denominate it a crime. It is made a crime by law. Hence my theory is based on the law, and is this, that in pursuance of the law, and in carrying out its principles, we must protect the country by protecting ourselves against crime and against criminals in this body. That is the ground I took and the theory I stated.

The principal ground of objection was to immediate action, and the claim was made that the case ought to be sent to a committee to determine Whittemore's right to be sworn in. Logan replied that the House was in possession of all the facts. He withdrew the demand for the previous question and the debate proceeded. Later on he said he supposed if there were not more than seventeen or eighteen who wanted to speak, of course it would not take much time, and that the House could vote down the previous question if it wanted more discussion. He said he did not care whether the House sustained the demand for the previous question or not. But the House seemed to be much more insistent than Logan, for the previous question was ordered and the vote on the main question was 130 to 24. No doubt some of those who voted in the negative were opposed to exclusion.

But the most of them must have felt as did Mr. Farnsworth, who said:

I do not know but that when this matter is properly investigated I shall also vote for excluding Mr. Whittemore from a seat, but I think it ought to be first investigated by a committee.

The resolution in this case provided for the return of his credentials to Whittemore and his exclusion from the House,

GEORGE Q. CANNON.

The case of George Q. Cannon, who was excluded from the Forty-seventh Congress as a Delegate on the ground that he was a polygamist, on principle clearly sustains the proposition of exclusion of a Member.

It is true that when excluded Cannon was merely a Delegate-elect from the Territory of Utah, and not a person elected to an office created by the Constitution.

Nevertheless, we assert that on principle that case can not be differentiated from the case at bar.

Allen G. Campbell was a candidate for Delegate from the State of Utah against George Q. Cannon in 1880. Campbell received about 10

per cent of the votes cast, and the governor issued a certificate to him on the theory that Cannon was ineligible to be a Delegate in Congress. Campbell's seat was contested by Cannon. The committee, in January, 1882, made a very elaborate report. All but one united in declaring that Campbell, not having received a majority of the votes, was not entitled to a seat, and the dissenting member finally agreed with the majority, that whatever Cannon's rights might be, Campbell ought not to be seated.

A considerable majority of the committee further found that as Cannon was a polygamist he was ineligible and disqualified to be Delegate in Congress. At this time the Edmunds law had not been passed, and there was no statutory ground of ineligibility.

Some members of the committee undertook to differentiate between the right of the House to exclude a Member and its right to exclude a Delegate, while other members insisted that, while there was a sharp distinction to be drawn between a Member and a Delegate, yet that in so far as the matter of ineligibility on the ground of polygamy was concerned the same principle would apply to both.

This, then, was the condition of the Cannon case before the Edmunds law was passed. The committee was unanimously of the opinion that Cannon was duly elected a Delegate from the State of Utah, and therefore that he was entitled to hold the certificate of election; that he stood in the attitude of a man appearing before the bar of the House with the proper certificate of the governor of the Territory of Utah and with no infirmity except that which went to his disqualification, namely, the fact of polygamy.

Before the case was taken up in the House for discussion and action the Edmunds law was passed. Mr. Cannon in his speech says that there were some members of the House who had told him that while they would not have excluded him under the report of the committee, they would then vote to exclude him because of the provisions of section 8 of the Edmunds Act; and Mr. Ranney, of Massachusetts, a member of the Committee on Elections, who had dissented from the majority report, declared that he felt compelled to vote in favor of the exclusion of Cannon because of the passage of that law.

Nevertheless, the fact appears, and we believe it to be the just inference from what occurred from the report of the committee and the debate on the floor of the House, that Cannon would have been excluded if the Edmunds law had never been passed. The vote in favor of allowing him his seat was 79, and against it 123.

As evidencing the claim we make as to the meaning of this action of the House, we give the following characteristic extracts from the debate. Other members expressed like sentiments.

MR. BELTZHOVER. But admitting for the purposes of this discussion what can not be maintained, that the same qualifications which entitle a Member of Congress to admission shall also entitle a Delegate to the same right, and I still hold that Congress has the right and power to say that a polygamist shall not be admitted as a Delegate. Under the high power inherent in every organization on earth to preserve its integrity and existence, Congress has the indubitable right to keep out of its councils any person whom it believes to be dangerous and hostile to the Government.

During the war almost the whole Congressional delegation from Kentucky were halted at the bar of the House, and on the objection of a member were not permitted to be sworn until it was ascertained whether they or either of them were guilty of disloyal practices. They had each every qualification usually required by the Constitution; they were duly and regularly elected and returned; they were sent by a sovereign State, holding all her relations in perfect accord with the Federal Govern-

ment; but the House proceeded to inquire into each case, and not until a reasonable investigation was had were any of them admitted. The committee which had the matter in charge reported and the House adopted and laid down the following rule on the subject of all such cases:

"Whenever it is shown by proof that the claimant has, by act or speech, given aid or countenance to the rebellion, he should not be permitted to take the oath, and such acts or speech need not be such as to constitute treason technically, but must have been so overt and public and must have been done or said under such circumstances as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."

In the case of John Young Brown, who was among the number, the committee almost unanimously reported against his right to admission, on the ground that he had written an imprudent and disloyal letter; nothing more. He had never committed an act of treason. He was never arrested, nor tried, nor convicted. He denied all treasonable intent in the letter and made every effort in his power to explain and extenuate his offense. But seven out of nine members of the Committee of Elections of the Fortieth Congress reported that he "was not entitled to take the oath of office or be admitted to the House as a Representative from the State of Kentucky." This report was adopted by the House by a vote of 108 to 43. The minority report in that case made an argument against the action of the majority in almost the same words and on identically the same grounds that the minority of the Committee on Elections occupy in the case under consideration. It was argued that Mr. Brown had all the constitutional qualifications, and that Congress had no right to exact more; that in any event he had never been tried or convicted of treason, and unless convicted of the crime even treason was no disqualification. But Congress then laid down the rule above given, and never abrogated since, that in addition to the ordinary constitutional requirements every man must be well disposed and loyal toward the Government before he can be admitted to Congress to aid in forming its policy and controlling its destinies.

The act of July 2, 1862, providing what is known as the ironclad oath, added a new and marked qualification to those required of members of Congress prior to that time, and every member who has taken that oath since has submitted to the exaction of that additional qualification. The distinguished counsel who argued the case of Mr. Cannon before the Committee on Elections felt the force of this act, and the long-continued practice of Congress under it, and explained it as a war measure. He said:

"The grounds upon which this law was vindicated, although not stated with much care or precision, are nevertheless clearly enough disclosed by the debates. It was enacted as a war measure. The ironclad oath was adopted as a countersign, which should, in time of war, exclude domestic enemies from the civil administration of the Government, in the same manner and for the same reason that the military countersign was employed to exclude those enemies from the military lines of the Army. It was enacted as a measure of defense against an armed enemy in time of war, and was as necessary and justifiable as any other war measure not specifically marked out in the text of the Constitution."

If Congress could, almost without challenge, provide and add such a distinct and imperative qualification, not for a Delegate, but for a Member of Congress in 1862, why may we not in 1882 ask a reasonable additional qualification for a Delegate from a Territory who does not come within the letter or the spirit of the Constitution? The act of 1862 was a bold and radical assertion of the doctrine of self-preservation on the part of Congress to maintain its integrity and the purity and loyalty of its counsels. The resolution recommended by the majority of the Committee on Elections says to the people of Utah, You shall not abuse the privilege of representation which we allowed you on the floor of Congress by sending as your Delegate a person who adheres to an organization that is hostile to the interests of free government, and whose doctrines and practices are offensive to the masses of the moral people of the great nation which we represent.

MR. MILLER. If all these things be true, Mr. Speaker; if that institution is anti-Republican, if it threatens the safety of this nation, why should it not be suppressed? Why should anyone holding those opinions and practicing those tenets be admitted to a seat in this House? Is there no law or authority to prevent this? Is it possible that a man who is a member of a political religious association which is hostile not only to the spirit of our laws, but also to the letter of the American laws and Constitution, can claim as a right under that Constitution a seat in the House?

This question is not a new one. In the case of John Young Brown, of Kentucky, who was duly elected a Representative from the Ninth Congressional district of that

State, and claimed his seat by virtue of said election in the Forty-first Congress, the Committee on Elections decided that disloyalty disqualified him from taking his seat in the House. And yet he had never taken an oath to support the Constitution of the United States which he had afterwards violated; he had never borne arms against the United States Government; he had never committed any overt act; all that he did was to declare in a public speech, 1861, and afterwards in a letter, that "Not a man or one dollar will Kentucky furnish Lincoln to aid him in his unholy war against the South. If this Northern Army shall attempt to cross our borders, we will resist it unto death, and if one man shall be found in our Commonwealth to volunteer to join them he ought and I believe he will be shot down before he leaves the State."

Before the committee he admitted that he had used this language, but denied the authority of Congress to refuse him a seat in the House, inasmuch as the language did not constitute an offense or raise a disqualification under the Constitution. Mr. Dawes, the present Senator from Massachusetts, was chairman of the Committee on Elections. The political friends of Mr. Brown in Congress contended that even if he was guilty of disloyalty, he could not be refused a seat in the first instance; that all that could be done would be to admit him, and then if he was guilty of any crime that would disqualify him from holding his seat he could be expelled.

Mr. BURROWS. It is conceded on all hands that George Q. Cannon possesses all the constitutional qualifications required for a Representative in Congress. A Delegate certainly does not require other or higher qualifications. The single and simple issue in the case is whether this House has the constitutional power to refuse admission to Mr. Cannon upon the ground that he is a polygamist. While I am in full accord with the views of those who hold that a Delegate is not a Member within the meaning of that word as used in the Constitution, and that our powers touching the exclusion of a Delegate are greater than those over a Member, yet in my view of the case I do not think the establishment of this principle necessary to the determination of the matter. I affirm that if a Representative from any of the States should demand admission to this House under the same circumstances as those surrounding Mr. Cannon it would be within our constitutional power to deny him admission.

If that position be correct, the importance of the distinction between a Representative and Delegate disappears. In standing upon this ground I am aware of that provision of the Constitution which prescribes the qualifications of Representatives, and that other provision which confers on each House the right to judge of the elections and qualifications of its own members. Nor do I overlook the long and unbroken line of decisions that it is not within the constitutional power of Congress nor of the States to add to or in any way modify these constitutional requirements.

But it will be observed that the Constitution does not undertake to specify those things which disqualify a person for membership. The doctrine is well settled that to entitle a person to a seat in this House he must not only possess those affirmative qualifications mentioned in the Constitution, to wit, residence and citizenship, but he must be free from those things which by common parliamentary law disqualify. In other words, a Representative, though duly elected, a citizen, and of proper age, would not be entitled to membership though duly elected and possessing all the constitutional qualifications. We would deny admission to a person infected with a contagious disease, and would be justified in so doing.

Should a member-elect, after he was chosen, be arrested and convicted of some infamous offense and punished by imprisonment in the State prison, would it be contended that if he should present himself at the bar of this House at the expiration of his term of imprisonment and demand to be received into membership, that it would not be within the constitutional power of this body to refuse him admission? Instances of personal disqualification might be multiplied indefinitely. This is sufficient, however, to illustrate my point.

The American people have long enough endured the shame of having seated in their high council a man who offends public decency, disturbs social order, defies national authority, and outrages the moral sense of all Christendom. Let the humiliation end now and forever.

ENGLISH PRECEDENTS.

Some importance is given by the minority to the final action of the House of Commons in the Wilkes Case. We are asked to infer from some remark attributed to Edmund Burke that he had written "*finis*" to the chapter on exclusions from parliamentary bodies.

As to that, we have to say that after diligent search we find no cases where the House of Commons ever held or decided that it had not the right to exclude at the very threshold a member whose certificate or credentials were perfect and uncontested, although the ground of exclusion was not a want of legal qualifications, and there are scores of cases since 1780 where it has claimed and exercised that right. We have found several cases where the House of Commons has declared that it possessed (and exercised) the right not only to exclude and suspend, but in a few instances to expel, a member for an offense unrelated to the functions of a member of Parliament, which offense was in a few instances committed before his election to Parliament, but was held to be of a continuing character.

The Houses of the American Congress have not accepted or followed these last-named precedents, due undoubtedly to the radical differences between organization, jurisdiction, and powers of the English Parliament and the American Congress. The most striking of these differences, as stated by Mr. Cushing, are that in this country members of both branches of Congress are elected for specified terms and that the members of the House of Representatives are apportioned among and elected by their several constituencies—so far as possible—upon the principle of equality; whereas in England the House of Lords is composed of members who are not elected at all, but who sit as members during their lives by virtue of hereditary or conferred right, as the nobility, or temporal lords, or of their appointment to places of high dignity in the church, as the archbishops and bishops, or lords spiritual; and the members of the House of Commons, though elected, are not apportioned among the several constituencies and elected upon the principle of equality or representation, but chiefly upon the principle of corporate or municipal right, and for no fixed period of time.

Another important difference is that the existence and powers of the House of Commons rest largely on custom and tradition, aided, of late years, by statute provisions, whereas in the House of Representatives (as well as the Senate) these powers are founded in and for a great part regulated, limited, and controlled by a written Constitution and laws.

It may be said that the House of Commons has uniformly taken the view that under the right to judge of the “qualifications” of its members—their legal election and return being conceded—it rests wholly within the discretion of that body to establish a new test or requirement of qualification for membership, and that it may be either mental, such as for imbecility or insanity, physical, as for paralysis, or for grave offenses against criminal laws.

Thus we see that the Senate and the House have taken the ground that they had the right to exclude for insanity, for disloyalty, and for crime, including polygamy, and, as we believe, there is no case in either the House or the Senate, where the facts were not disputed, in which either the Senate or House has denied that it had the right to exclude a man, even though he had the three constitutional qualifications. There is a large amount of debate, where opinions are given on both sides of the proposition, but as against that is the never-varying action of the two bodies themselves.

STATUTORY PRECEDENTS.

We present now the statutory declarations where disqualifications have been imposed.

Section 21 of the act of April 30, 1790, is as follows:

That if any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present, or reward, or any promise, contract, obligation, or security, for the payment or delivery of any money, present, or reward, or any other thing, to obtain or procure the opinion, judgment, or decree of any judge or judges of the United States, in any suit, controversy, matter, or cause depending before him or them, and shall be thereof convicted, and so forth, shall be confined and imprisoned, at the discretion of the court, and shall forever be disqualified to hold any office of honor, trust, or profit under the United States.

Section 5499, which was passed in 1791, provides—

That every judge of the United States who in any wise accepts or receives any sum of money or other bribe, etc., shall be fined and imprisoned, and shall be forever disqualified to hold any office of honor, trust, or profit under the United States.

Is a member of Congress an officer?

Before citing other acts of Congress, it is proper to discuss the question as to whether a member of Congress is an officer within the meaning of the statute.

If a member of Congress is not an officer, if the qualifications of a member of Congress are only those named in the Constitution, then, of course, the makers of the Constitution meant that nobody could be made ineligible for Congress, either by law or by the act of either body, even though laws passed immediately after the adoption of the Constitution made him ineligible for all other positions under the Government.

Now, upon that proposition we make these observations, as to the meaning of the word “office.”

First. Undoubtedly under the Constitution, in one or two instances, the word office does not include Representative in Congress, as, for example, the last paragraph of section 6, article 1:

No person holding any office under the United States shall be a member of either House during his continuance in office.

In that case the words “holding any office” means an office other than a member, but the context is absolutely unmistakable, and no person is in danger of assuming, even if a member of Congress hold an office, that it meant to say that no member of Congress shall be eligible to be a member of Congress.

In the second place, the provision in the last paragraph of section 3, of article 2, relating to the duties of the President, that he shall commission all the officers of the United States, does not mean that he is to commission members of Congress, but he is himself an officer, and he does not commission himself, nor does he commission the Vice-President, who is also an officer under the United States.

So also paragraph 2, section 1, article 2:

But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

There the distinction is made “No Senator or Representative, or person holding an office of trust.”

But under the Constitution the word “office” must include in certain of its provisions a Representative in Congress.

It is inconceivable that in the Constitution the word "office" never includes a member of Congress. Look at the last paragraph of section 3, article 1.

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Is it conceivable that the framers of the Constitution meant that a man might be adjudged guilty in case of impeachment, and that that judgment of guilty could carry with it a judgment disqualifying him from holding any office, save only to be a Representative or Senator in Congress?

Paragraph 8, section 9, article 1, is as follows:

No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

Did the Constitution mean that Representatives and Senators in Congress could receive emoluments, presents, office, or title from some king, prince, or foreign state, but no other person holding an office could without the consent of Congress?

But in the next place, as to statutes. Whatever may be held to be the meaning of the word "office" in the Constitution, it does not follow that the same meaning must be given to it in the statutes. We find a varying meaning in the Constitution, and we find a varying meaning in the statutes. The act of 1790 has always been assumed to cover members of Congress.

Section 5500 of the Revised Statutes, originally passed in 1853, and now in substantially the form in which it was when originally passed, provides :

Any member of either House of Congress who asks, accepts, or receives any money, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money, * * * either before or after he has been qualified or has taken his seat as such member, with intent to have his vote or decision on any question, matter, cause, or proceeding * * * pending in either House, * * * shall be punished by a fine, etc.

Section 5502 is as follows:

Every member, officer, or person convicted under the provisions of the two preceding sections who holds any place of profit or trust shall forfeit his office or place, and shall thereafter be forever disqualified from holding any office of honor or trust or profit under the United States.

This section applies explicitly to a member of Congress, and brings forfeiture of the office or place held by him. If "office" in this section does not include a member of Congress the word "place" must include him.

Now, the word "office" in that concluding part of this section must refer to member. First, because the word "office" is used in the preceding line as necessarily including a place that is held by a member. It can not fail to include that, for it refers to a "member" and what shall happen to him. In the next place, because it is not conceivable that the legislative body intended that the violation of that law by a member should forfeit the position that the member had and then not intend to disqualify him from being elected again as a member of the House when it disqualifies him from holding all other offices or places under the United States.

But that is not the only statutory construction of the word office. It is still more explicitly declared in the test-oath act of July 2, 1862:

That hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation:

“I, A B, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto.

“And I do further swear (or affirm) that to the best of my knowledge and ability I will support the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.”

Which said oath, so taken and signed, shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain.

Any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that offense, shall be deprived of his office and rendered incapable forever thereafter of holding any office of trust under the United States.

It will be noticed that the only person required to take that oath is an officer, a person elected or appointed to any office of honor or profit, but it does not include in this phraseology a member.

By reference to the concluding portion of the act it will appear that the word office does include a member of Congress.

Which said oath so taken and signed shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain.

We not only have the use of the word “Congress” as indicating to what the word “office” appertains, but also the universal, unquestioned construction by the acts of the Senate and of the House in compelling the test oath to be taken year after year until it was repealed. Each house of Congress recognized that that oath was an oath to be taken by a Representative in Congress, notwithstanding the fact that the act passed made it apply only to a person elected or appointed to an office of honor or trust in the United States.

We quote this section here, as well for the purpose of showing the Congressional precedents imposing a substantial qualification, or disqualification, upon the members of Congress, really substantial in its character, as the facts of history show, as to exhibit what is meant in the statutes by the word “office.”

There are many other statutory provisions, passed from time to time since 1790, disqualifying for office of trust or profit under the United States persons guilty of the several crimes defined in those statutes. We do not refer to them specifically, but they are illustrated by the statutes already quoted.

It ought also to be said that section 8 of the Edmunds Act, whatever meaning may be given to it, evidences the legislative will to disqualify polygamists for office. It indicated the legislative purpose so aptly described by Justice Matthews, in the Ramsey case, when he said that no more cogent or salutary method could be taken than was taken by

the Edmunds Act, which undertook to withdraw from all political influence those persons who showed a practical hostility to the development of a commonwealth based upon the idea of the union for life of one man and one woman in the holy estate of matrimony.

The statutory declaration, if we may use that form of expression as applicable to the joint action of the House, coupled with the President's approval, is only a more solemn declaration by both Houses of the principle that it has the right to exclude under certain conditions; that either House may do it. That very point was made in the discussion on the test oath in the Senate—that of course that law could not with certainty bind any succeeding Senate or any succeeding House, but that it was apparent that, so long as there existed any necessity for such an oath, and in the very nature of things the time would come in a few years when it would not be necessary, either House would respect its requirements and compel a submission to it; and that was the action of the Senate and House for nearly twenty years.

THE INELIGIBILITY CREATED BY THE EDMUNDS ACT.

Having in mind that portion of this report in which we have heretofore set out the status and condition of Brigham H. Roberts, we would inquire where the specific provisions of the Edmunds Act place him.

Two facts appear as pertinent to this inquiry:

First. That he was convicted in 1889 of unlawful cohabitation under that act, and served a term in the penitentiary therefor.

Second. That he has been ever since 1885, and is now, a polygamist, as that word is used in section 8 of the Edmunds Act and defined by the Supreme Court of the United States in the cases of *Murphy v. Ramsey* (114 U. S., 15) and *Cannon v. The United States* (116 U. S. 55). Section 8 is as follows:

No polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States.

Reading that act as applicable to this case, eliminating the irrelevant portions, it appears as follows:

No polygamist shall be entitled to hold any office or place of public trust, honor, or emolument under the United States.

In the Ramsey case, above referred to, a specific distinction is made between a polygamist and a person cohabiting with more than one woman. A polygamist is a person having a certain status respecting more than one woman. The condition, therefore, of a polygamist may be merely passive and requiring no affirmative act. To cohabit with more than one woman is, however, to do an affirmative thing. The result is that one who has two or more wives that he holds out to the world as such is a polygamist, wherever he may be, while one who cohabits with more than one woman is not cohabiting except in the place in which, of necessity, cohabitation must occur.

In the Ramsey Case the court illustrated its definition of a polygamist as being a status or condition like any other qualification for

elector, or for office, and declared that it was as if Congress had undertaken to make a married man ineligible. It would be the status in that event of being a married man which would create and continue the ineligibility.

It therefore appears that the fact that a man is a polygamist is a fact that inheres in him and stays with him, and persists in remaining with him wherever he may go, so long as he is the possessor of more than one wife; and just as one who is a married man in the State of Maryland continues to be a married man if he leaves his wife at home and comes to the District of Columbia, so Mr. Roberts, being in the condition or status of a polygamist in the State of Utah, does not leave that status behind, nor does he dissociate himself from that status or cast off the garb of a polygamist by leaving his wives at home and traveling from that State into the District of Columbia.

In the very nature of things the House of Representatives, wherever it is as a House of Representatives, is in a place under the exclusive jurisdiction of the United States; therefore when Roberts comes into the District of Columbia, in the status of a polygamist, he is ineligible under the Edmunds Act to hold any office or place under the United States, and therefore ineligible to hold the position of member of the House of Representatives.

The principles underlying the SECOND main ground of disqualification, hereinbefore asserted, have already been fully discussed, but the ground is appropriately restated at this point.

We assert before the House, the country, and history that it is absolutely and impregnably sound, not to be effectively attacked, consonant with every legislative precedent, in harmony with the law and with the text-books on the subject:

That Brigham H. Roberts's persistent, notorious, and defiant violation of one of the most solemn acts ever passed by Congress, by the very body which he seeks now to enter, on the theory that he is above the law, and his defiant violation of the laws of his own State, necessarily render him ineligible, disqualified, unfit, and unworthy to be a member of the House of Representatives. And this proposition is asserted not so much for reasons personal to the membership of the House, as because it goes to the very integrity of the House and the Republic as such.

THE COMPACT OF STATEHOOD.

We come now to the third main proposition, that his election involves a breach of the compact and understanding by which Utah was admitted to the Union.

Utah was admitted to the Union with the distinct understanding upon both sides that polygamous practices were under the ban of the church, prohibited and practically eradicated, both as a practice and a belief, and that they would not be renewed.

The effort is made to alarm people upon this proposition that some similar objection might be made to representation from States in which the claim might be made that the right to vote was denied to some citizens. It is a sufficient answer to this to say that if such ground of complaint exists the Constitution specifically tells us what our remedy is; and declares precisely, in the fourteenth amendment,

what we may do in any event when the right of suffrage is improperly denied. There is no possible escape from that position, even assuming that there was anything in the bogie man.

But as to Utah, she was admitted on the express statement that the practice of polygamous living was interdicted by the church, was practically abandoned by the people, and eradicated as a belief. Of course that sporadic instances of the violation of the law against cohabitation might occur no one doubted.

The manifesto forbidding plural marriages and enjoining obedience to the laws relating thereto was issued by Wilford Woodruff, president of the Church of Jesus Christ of Latter-Day Saints, September 25, 1890

Some doubt having arisen as to whether that manifesto prohibited association in the plural marriage relation as well as the contracting of plural marriages as a ceremony, President Woodruff himself testified under oath as follows:

Q. Did you intend to confine this declaration and advice to the church solely to the question of forming new marriages, without reference to those that were existing—plural marriages?—A. The intention of the proclamation was to obey the law myself—all the laws of the land on that subject—and expecting that the church would do the same.

Q. You mean to include, then, in your general statement, the laws forbidding association in plural marriages as well as the forming of new marriages?—A. Whatever there is in the law with regard to that—the law of the land.

Q. Let me read the language, and you will understand me, perhaps, better. “Inasmuch as laws have been enacted by Congress forbidding plural marriages, * * * I hereby declare,” etc. Did you intend by that general statement of intention to make the application to existing conditions where the plural marriages already existed?—A. Yes, sir.

Q. As to living in the state of plural marriage?—A. Yes, sir; that is, to the obeying of the law.

Q. In the concluding portion of your statement you say, “I now publicly declare that my advice to the Latter-Day Saints is to refrain from contracting any marriage forbidden by the laws of the land.” Do you understand that that language was to be expanded to include the further statement of living or associating in plural marriage by those already in the status?—A. Yes, sir; I intended the proclamation to cover the ground—to keep the laws, to obey the law myself—and expected the people to obey the law.

The significance of this statement by the spiritual head of the church is the more apparent when we remember that it was made but a short time before the question of the admission of Utah was debated in the House of Representatives.

Is it to be an occasion for wonder, therefore, that the proclamation of amnesty issued by President Harrison, January 4, 1893, should contain these words:

Whereas it is represented that since the date of said declaration the members and adherents of said church have generally obeyed said laws and abstained from plural marriages and polygamous cohabitation; and

Whereas by a petition dated December the 19th, 1891, the officials of said church, pledging the membership thereof to the faithful obedience of the laws against plural marriages and unlawful cohabitation, applied to me to grant amnesty for past offenses against said laws.

Is it strange that the House Committee on Territories in 1893 should report that “polygamy is dead?” And if that is not fully convincing, let the unprejudiced mind consider the following extracts from the debate in the House of Representatives on the admission of Utah, December 12, 1893:

Mr. Rawlins, the delegate from the Territory, seems to have hypnotized the House by his eloquence.

Mr. MORSE. The twin relic of barbarism, polygamy, still lives. And while it does live and is in the ascendancy I can never vote to admit Utah as a State of the Union.

Mr. RAWLINS. It was found in 1882 there were 2,225 adult male polygamists in the Territory of Utah. This report proceeds to say:

"It is not denied by the advocates of admission that polygamy is practiced in that Territory, but they claim it is not obligatory upon the members of the Mormon Church, but that it is gradually dying out until now there are comparatively few who are living in polygamous relations, and that this few are generally past the meridian of life. They claim that polygamous marriages have ceased to be solemnized, that in the near future polygamy will have ceased altogether, and is even now practically dead, and that it is unjust to deprive the many of political rights because the comparatively few are violating the law in this regard."

The majority report of the committee in 1888 found that the practice of polygamy had been decreasing. It was claimed then by representatives of the Mormon people that polygamy had been forbidden by the Mormon Church, and they asserted that it was no longer in existence and would not revive.

Mr. MORSE. Will the gentleman allow me to ask a question right there?

Mr. RAWLINS. Yes, sir.

Mr. MORSE. Is it not a fact that prior to the election of the gentleman the Territory of Utah sent here as their representative Mr. Cannon, who had six wives?

Mr. RAWLINS. No, sir.

Mr. MORSE. How many wives did he have?

Mr. RAWLINS. You mean George Q. Cannon?

Mr. MORSE. He was a polygamist, was he not?

Mr. RAWLINS. That is ancient history, my friend. Mr. Caine has represented Utah here; he was my predecessor as the Delegate from the Territory. He served here ten years. Mr. Caine is not a polygamist. In 1882 Mr. Cannon, the polygamist you speak of, was excluded from his seat in Congress on account of his polygamy.

Mr. MORSE. But he represented the sentiment of those people all the same because they elected and sent him here.

Mr. RAWLINS. They elected him in years gone by. I am not denying, my dear friend, that in 1853 or 1860, or 1875 or 1880, polygamy was practiced in Utah. I am not denying that the people of that Territory elected polygamists to office in those old days. But the gentleman does not seem to know that the world does progress. (Applause.) There is nothing under the sun that is not changeable and subject to alteration. And that being so, the gentleman himself had better be careful.

Governor West in his report, which I have in my hand, one of the chief men who opposed it, perhaps more violently than any other, says:

"The practice of polygamy has been abandoned by the church and the people. Polygamous marriages are forbidden by the authorities of the church. The people or church party has been dissolved, and the conditions existing in the Territory are now in nowise different from those in vogue in the States of the Union."

Now, when polygamy was yielded—as it was in fact yielded in 1887, when the question was eliminated—there was no reason any longer for the Mormon people to stand together.

Now, Mr. Chairman, if I may be permitted to proceed, I would like to do so for a few moments without interruption. A case was tried in Idaho about 1886, in which a large number of witnesses were called who testified that polygamy in that Territory as early as 1884 had been forbidden by the church. Testimony was given in a case as early as 1888 that in Utah the Mormon authorities had in reality forbidden the practice of polygamy or the contraction of polygamous marriages as far back as 1886, and that after that time the practice had not existed. In 1888 the legislature of the Territory of Utah passed what is entitled "An act regulating marriages." It will be found in 2 Compiled Laws of Utah of 1888, page 92. The second section of that act provides that marriage is prohibited and declared void where there is a husband or wife living from whom the person is not divorced.

I understand well enough that there is a sentiment among certain members of the House that there ought to be in the enabling act a provision that the constitution of the State shall make polygamy punishable as a crime. There is no substantial objection to that. In 1888 the people of the Territory of Utah proposed to insert such a provision in their constitution. The only objection that there is to it does not come from the Mormons or the Mormon people. The Territory has enacted stringent laws for the suppression of polygamy. There are other provisions to which I might refer relating to the methods by which these laws shall be enforced.

Now, the laws to which I have referred, enacted by the Territorial legislature, will by the operation of this provision of the enabling act, be continued in force under the State government. It is true that the legislature of the State might, if it saw fit, repeal or modify those statutes; but polygamy would be unlawful. Polygamous marriages would be invalid, by force of these Territorial statutes upon the passage of this enabling act, without any provision in the constitution or in the enabling act other than what I have read providing against polygamy.

This objection which I have, as I have already stated, to the definition of the offense of polygamy in the constitution, is that if that provision be adopted by Congress it will leave the matter in an unsatisfactory condition, for the reason that it will repeal, for instance, the statutes that I have read, enacted by the legislature of the Territory; because the definition of "polygamy," as contained in the amendment of the minority, is inconsistent with these statutes. It rather tends, in my judgment, to prevent the exercise of the full authority on the part of the State powers to prevent any revival of this obnoxious practice, and we do not intend—the people of Utah do not intend, in my belief—that it shall be revived.

There is, I think, nobody in the Territory at this time who has any desire whatever to revive it. The leaders of the Mormon Church have solemnly professed and pledged their faith and honor and the faith and honor of the people—the entire people of the Mormon Church—that they will not revive this practice. They did it in the petition for amnesty addressed to the President, and all the leading Federal officers in the Territory joined in a statement that they believed these men were sincere in asking the President to exercise his clemency in their behalf in accordance with the petition.

There have been no Mormon polygamous marriages in Utah, so far as known, within the last eight or ten years, with few exceptions, and the public declaration of the Mormon Church is that there has been a discontinuance of the practice. The legislature has enacted every law required for the prevention of the revival of this practice, and in view of these facts no provision is necessary, in my judgment, although I am willing to consent that the amendment proposed by the gentleman from Vermont, which has been read, may be adopted.

Now, the people of Utah have more at stake upon this question than gentlemen who represent other constituencies. I have traveled among these people, met them in every locality, discussed questions with them, civil and political; I know them as well as any man can know a people, because I have been with them all my life. I think I understand the sentiment that prevails among those who are uppermost in the councils of the political parties in the Territory of Utah, and who would be likely to dominate its affairs in case it be admitted as a State, and I am prepared to say upon my conscience that I believe these people can be safely intrusted with the full measure of self-government, which would be accorded under statehood.

The people of the East are misinformed as to the character, education, and the intelligence of the people of Utah. I have in mind more than a hundred young men, born and educated in that Territory, who would grace the administration of any State in this Union on account of their ability, their learning, and their integrity. You will never have occasion to regret this act. By the admission of the Territory of Utah I believe her people, 240,000 in number to-day, and probably in three or four years, with statehood, 500,000, will send to these halls men who will not only do credit to the people they represent, but who will be of service in the affairs of this great nation.

Now, Mr. Chairman, let me say that a change has taken place in Utah. How that change may be brought about may be interesting to gentlemen who are not familiar with its history. The making and enforcement of laws by Congress has had something to do with it. There is no question about that. But there has also been developing for many years past in the Territory of Utah a sentiment among the people who have been born and brought up there, which has had a great deal to do with this change. The eradication or discontinuance of polygamy is perhaps first due to external pressure, but still more largely to the efforts of people within the Mormon Church itself to bring about the reform of the organization in that respect.

It should be borne in mind that but a very small proportion of the Mormon people have ever practiced polygamy. Those who did not practice it saw the evil consequences which followed from its practice, the unhappiness which it caused in families and that it rendered the people of Utah obnoxious to the prevailing sentiment of the age. Its practice disturbed the tranquillity, impeded the progress, retarded the growth, darkened the character, and destroyed the prosperity and happiness of the people.

Thousands of non-Mormons have come to Utah and made their homes there. Our schools are free; attendance is required; they are nonsectarian. Education has been freely disseminated. Under such conditions polygamy, having once been suppressed or extirpated, is not likely to be revived.

Mr. VAN VOORHIS, of New York. I would like to ask the gentleman whether there has been any revelation on the subject of polygamy recently, or does the head of the church claim there has been?

Mr. RAWLINS. The Mormon people claim that their duty with reference to the practice has been defined by a revelation. The present president of the Mormon Church, on the 26th of September, 1890, issued a manifesto in which he forbade the Mormon people from contracting marriages in violation of law. At a great conference of the Mormon people, ten or fifteen thousand being present, embracing all the various organizations of the church, it was moved that this declaration of the president of the church be regarded by the church as authoritative and binding, and that motion was unanimously adopted by the vote of that great congregation.

The elders of the Mormon Church got up and said that this came to the people with all the force of a revelation, and was binding upon them, and many of the Mormon people have testified in court, when occasion has arisen when such testimony would be relevant, that they regard that as a revelation from Almighty God; that they no longer believe polygamy and its practice to be right, and in effect it is not only discontinued as a practice, but so far as the great mass of the Mormon people is concerned it is eradicated as a belief. But the people of Utah—I think I can speak for them on this question—mean, I believe, what they say. They are engaged in no scheme of fraud or treachery by which to deceive the nation. Having made this pledge, and on this pledge asked this action by the American Congress, I think I can say for them that they will stand by it though the heavens fall.

Mr. NEWLANDS. I think I express the unanimous sentiment of the people of the mining region and of the Pacific coast generally when I urge upon this House the admission of that Territory as a State. No apprehension is indulged in whatever with reference to the question of polygamy. The feeling of all who live in that region and who are familiar by personal contact with Utah and its institutions is that polygamy is practically dead.

Mr. OATES. Mr. Chairman, I have long since been satisfied that polygamy as it existed in the Territory of Utah was crushed out and destroyed by the enforcement of the Edmunds-Tucker law.

And so the enabling act was passed. Every incredulous member who cast doubt upon the sincerity of polygamists in Utah was whistled down the wind. Every legislator who doubted if the funeral of polygamy had really taken place, was laughed to scorn. Polygamy was dead! That was the battle cry, and on it the battle was fought and won.

What would have become of the bill if Mr. Rawlins had declared that the State of Utah, just about to be born, would reserve the right to send a polygamist to Congress? His bill would have been buried beneath an avalanche of votes beyond the hope of resurrection.

The language of the enabling act is, "provided that polygamous or plural marriages are forever prohibited."

The understanding was that those words prohibited the practice of living in the status or condition of polygamous marriage.

Bouvier's Law Dictionary says:

Marriage.—A contract made in due form of law by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife. Marriage, as distinguished from the agreement to marry, the mere act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on themselves.

"Marriage" is the *legal status or condition* of husbands and wives just as infancy is the legal relation or condition of persons under age. (1 American and English Encyclopedia of Law, vol. 14, p. 470.)

The act of marriage having been once accomplished, *the word becomes afterwards to denote the relation itself*. (Schouler on Domestic Relations, 22.)

Marriage is the civil status of one man and one woman united in law for life under the obligation to discharge to each other and to the community those duties which the community, by its laws, holds incumbent on persons whose association is founded on the distinction of sex. (1 Bishop on Marriage and Divorce, 3.)

Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary. (Hart's California Civil Code, 55.)

Marriage is the union of one man and one woman so long as they shall both live together to the exclusion of all others by an obligation which during the lifetime the parties can not of their own volition or will dissolve, but which can be dissolved only by the authority of the State. (19 Indiana, p. 57.)

Senator Rawlins was asked before this committee the following question:

Without reference to any assumed facts in this case, do you think that Congress would have admitted Utah to statehood if it had been predicted that Utah would send here in a few years a man as her Representative who was polygamously living with more than one wife?

He answered:

I do not think the Congress of the United States would have admitted Utah if they at that time had believed that a revival of the practice of polygamy would occur.

It is not to be assumed from the fact that a rare or sporadic case of polygamous marriage occurred in Utah, or sporadic instances of unlawful cohabitation had come to light, that that would be a violation of the agreement; but we take it that it is in the last degree a violation of the agreement or understanding when that State sends to Congress a man who is himself engaged in the persistent practice of the very thing the abandonment of which was the condition precedent to its admission; and that man the most conspicuous defier of the law and violator of the covenant of statehood to be found in Utah.

As bearing on this, we here quote the manifesto issued a few days ago by the Mormon Church and presented by Senator Rawlins to the Senate:

In accordance with the manifesto of the late President Wilford Woodruff, dated September the 25th, 1890, which was presented to and unanimously accepted by our general conference on the 6th of October, 1890, the church has positively abandoned the practice of polygamy, or the solemnization of plural marriages, in this and every other State, and that no member or officer thereof has any authority whatever to perform a plural marriage or enter into such a relation. Nor does the church advise or encourage unlawful cohabitation on the part of any of its members.

In other words, the Mormon Church has left it to us and not to the church to say what shall be done with Mr. Roberts. Is the House of Representatives to respond in any uncertain tone?

THE RIGHT TO EXPEL.

Upon this alternative proposition that the proper method of procedure is to permit the claimant to be sworn in, and then, if a two-thirds vote can be obtained to expel him, we desire to call attention first of all to what Story says on that subject, section 837:

The next clause is, "Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power, and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior or disobedience to those rules. *And as a member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence of clamor, the power to expel for very aggravated misconduct was also indispensable, not as a common but as an ultimate redress for the grievance.*

And again, section 838:

What must be the disorderly behavior which the House may punish, and what punishment other than expulsion may be inflicted, do not appear to have been settled by any authoritative adjudication of either House of Congress. A learned commentator supposed that members can only be punished for misbehavior committed during the session of Congress, either within or without the walls of the House, though he is also of opinion that expulsion may be inflicted for criminal conduct committed in any place.

And after a reference to the Blount case Story says:

It seems, therefore, to be settled by the Senate upon full deliberation that expulsion may be for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Senator.

On the subject of expulsion, Rawle says, second edition, page 48:

Both the Senate and the House of Representatives possess the usual power to judge of the elections and qualifications of their own members, to punish them for disorderly behavior, which may be carried to the extent of expulsion, provided two-thirds concur. It had not been yet precisely settled what must be the disorderly behavior to incur the punishment, nor what kind of punishment is to be inflicted.
* * *

Paschal on the Constitution, page 87:

It seems to be settled that a member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a member.

We do not need to call particular attention to the phraseology of the constitutional provision, nor do we think it very important to consider the evolution, from the standpoint of punctuation, through which that provision went in the constitutional convention. It now appears as following in the same sentence as the provision for disorderly behavior, with only the rhetorical separation of a comma from it.

It thus appears that the language of the provision for expulsion, in the view of the ablest commentators, furnishes clear and cogent reasons for its construction, and that neither House ought to expel for any cause unrelated to the trust or duty of a member.

This has been the uniform practice of both Houses of Congress.

The case of *Hiss v. Bartlett* (3 Gray, 468) is cited as showing the unlimited power of a legislative body to expel.

A casual reading of this case, which a careful reading confirms, will show that it directly sustains the position of the majority.

As there was no constitutional provision in Massachusetts respecting expulsion, the legislature of that State was, of course, clothed with all the powers incident to expulsion which are inherent in a legislative body whose powers are not limited by a constitution.

In addition to that, Hiss was expelled on the ground that his "conduct on a visit to Lowell, as one of a committee of the house, was highly improper and disgraceful, both to himself and to the house of which he was a member."

Everything said by the court had relation to such a state of facts. The case is one of expulsion for gross misconduct as a member and in the performance of his duty as a member.

Neither House has ever expelled a member for any cause unrelated to the trust or duty of a member.

Both Houses have refused to expel where the proof of guilt was clear, but where the offense charged was unrelated to the trust or duty of a member.

HUMPHREY MARSHALL.

The Senate in 1796 refused to expel Humphrey Marshall, of Kentucky. He was charged with the commission of a grave offense against the law of his State. The Senate refused to expel, on the ground that it had "no jurisdiction" to do so.

SMITH.

In 1808 the Senate had the case of Smith, charged with complicity in the conspiracy of Aaron Burr. It refused to expel.

WILLIAM N. ROACH.

In 1893 proceedings were set on foot in the Senate looking to the expulsion of William N. Roach, a Senator from North Dakota. A long and exceedingly interesting discussion followed, but the proceeding was abandoned without coming to a vote and Roach served out his term. Not a solitary precedent in the American Congress was cited in support of the proposition to expel. There was no precedent.

HERBERT CASE.

The difficulties attending expulsion are illustrated by the case of Herbert in the Thirty-fourth Congress.

On the 15th of May, 1856, Mr. Knowlton introduced a resolution referring to the homicide of Thomas Keating, at Willard's Hotel, on the 8th of the same month, by Mr. Herbert, a Representative from the State of California, and instructing the Committee on the Judiciary to take the case into consideration, with power to send for persons and papers, and to report what action the House should take in the premises.

The House refused to entertain the proposition. This all occurred at the first session of the Thirty-fourth Congress. At the third session a petition was sent to the House signed by 2,232 citizens of California, declaring their belief that, in the murder of Keating, Mr. Herbert had committed an act entirely without justification, had disgraced his high position, and that he could no longer satisfactorily represent the will of his constituents in the House of Representatives, and asking that, in the event of his acquittal by the court, he should be expelled from the House. This petition was referred to the Committee on Elections. On the 24th day of February, 1857, Mr. Colfax submitted the report of the committee. The committee, without making any recommendation, concluded their report in these words:

"Your committee therefore report the character of the petition, the statements embodied in it, and the number of its signers, that the House may determine what action under the circumstances they may deem just to all concerned."

The House took no action whatever in the case, and Mr. Herbert continued to be a member of the House until the expiration of the Thirty-fourth Congress. He voted at the very last call of the yeas and nays on the 3d day of March, 1857.

Herbert was acquitted in court of the crime charged.

The next case in point in the House of Representatives is that of

O. B. MATTESON.

He had resigned in the Thirty-fourth Congress before a resolution of expulsion was passed. He was charged with a grave offense—an offense inconsistent with his trust and duty as a member. He was reelected to the Thirty-fifth Congress, and took his seat without question or objection.

In the Thirty-fifth Congress a resolution of expulsion was proposed against him. The case went to a committee, and that committee, in a somewhat elaborate argument, reported against the expulsion of Mat-

teson, on the ground that the Thirty-fifth Congress had no right to expel, because the offense was committed in the previous Congress, and did not relate to any violation of his trust or duty as a member of the Thirty-fifth Congress.

The resolution reported was to the effect that it was inexpedient for the House to take any further action in regard to the resolution proposing to expel O. B. Matteson, and the House never did take any further action, excepting to lay the resolution on the table, and Matteson served through the Thirty-fifth Congress.

BROOKS AND AMES CASES.

In the next place we have the Brooks and Ames cases. They were cases in which charges had been made against Oakes Ames and James Brooks of corruption in connection with Credit Mobilier, and a special committee of five took the cases and reported in favor of expulsion. Thereupon the Judiciary Committee, which had taken up a resolution respecting Colfax, reported on the Ames and Brooks cases, with an elaborate argument setting out that the House had no right to expel, and gave many reasons, among others that it was an imposition of a qualification not fixed by the Constitution. They laid down the same proposition that can rightfully be urged against expulsion here, if the minority of this committee is right.

On February 18, 1873, the special committee submitted an elaborate report, concluding with the following preamble and resolutions, viz:

1. Whereas Mr. Oakes Ames, a Representative in this House from the State of Massachusetts, has been guilty of selling to members of Congress shares of stock in the Credit Mobilier of America for prices much below the true value of such stock, with intent thereby to influence the votes and decisions of such members in matters to be brought before Congress for action: Therefore,

Resolved, That Mr. Oakes Ames be, and he is hereby, expelled from his seat as a member of this House.

2. Whereas Mr. James Brooks, a Representative in this House from the State of New York, did procure the Credit Mobilier Company to issue and deliver to Charles H. Neilson, for the use and benefit of said Brooks, fifty shares of the stock of said company at a price much below its real value, well knowing that the same was so issued and delivered with intent to influence the votes and decisions of said Brooks as a member of the House in matters to be brought before Congress for action, and also to influence the action of said Brooks as a Government director in the Union Pacific Railroad Company: Therefore

Resolved, That Mr. James Brooks be, and he is hereby, expelled from his seat as a member of this House.

Mr. Sargent, of California, offered the following substitute:

Whereas by the report of the special committee herein it appears that the acts charged as offenses against members of this House in connection with the Credit Mobilier occurred more than five years ago, and long before the election of such persons to this Congress, two elections by the people having intervened; and whereas grave doubts exist as to the rightful exercise by this House of its power to expel a member for offenses committed by such member long before his election thereto, and not connected with such election: Therefore

Resolved, That the special committee be discharged from the further consideration of this subject.

Resolved, That the House absolutely condemns the conduct of Oakes Ames, a member of this House from Massachusetts, in seeking to procure Congressional attention to the affairs of a corporation in which he was interested, and whose interest directly depended upon the legislation of Congress, by inducing members of Congress to invest in the stocks of said corporation.

Resolved, That this House absolutely condemns the conduct of James Brooks, a member of this House from New York, for the use of his position of Government

director of the Union Pacific Railroad and of member of this House to procure the assignment to himself or family of stock in the Credit Mobilier of America, a corporation having a contract with the Union Pacific Railroad, and whose interests depended directly upon the legislation of Congress.

They could not say that the things complained of were unrelated to these men as members, because at the time of their occurrence they were members not of the House that was then considering the resolutions, but of a previous House. The result was that the resolutions did not refer to any claim that these facts had no relation to Ames and Brooks as members. *The resolution, declaring in its preamble the grave doubt of the House as to its right to expel under those circumstances, was substituted for the original resolution by a vote of 115 to 110.* Thereupon a motion was made to lay the preamble of the substitute on the table—that is to say, the proposition was made to vote down the principle declared in that substitute that the House had no jurisdiction.

That motion was lost by a vote of 79 to 123, and Mr. McCullough was the only person who, in the progress of the vote, gave his reasons for voting no, and he said he voted no because he doubted the power of the House to expel. Thereupon a motion was made to adopt the preamble, and that motion failed to carry by a vote of 98 to 115, a very much smaller majority than that by which the motion to lay it on the table was lost. The inference from these two votes is that as to this particular proposition there was uncertainty in the minds of the members, and they were not ready to make a definite declaration. Thereupon the House by an overwhelming majority adopted the resolutions of condemnation.

The sum and substance of it all is, that the House in the Ames and Brooks case, where, as we apprehend, history and all authority declare the proof of guilt was practically conclusive, refused to adopt the report of the committee in favor of expulsion, and merely censured the offending members.

As indicating the views of eminent and able members of the House on this question, we quote the following from the debate on the Ames and Brooks case:

MR. McCRARY. Now, sir, in this case, if the facts which the committee have found are true, the purpose and object of these corrupt transactions was to secure influence not alone in the Fortieth Congress, but in subsequent Congresses as well. The Union Pacific Railroad Company and the Credit Mobilier expected to require, perhaps, not positive legislation, but they desired to prevent unfriendly legislation in all these Congresses. I have no doubt that they would have been glad if they had the power to have prevented this present investigation.

Without discussing the general question of jurisdiction, about which I confess I have some difficulty, I am perfectly satisfied to rest the jurisdiction of the House in this case upon the ground which I have just stated.

MR. FARNSWORTH. Mr. Speaker, since I first examined the subject of the right of the House of Representatives to expel a member under that provision of the Constitution which authorizes each House to "punish its members for disorderly behavior," and "with the concurrence of two-thirds expel a member," my conviction has been growing stronger and stronger that this House has no jurisdiction of an offense committed by a person before he was a member of this body. I do not propose to enlarge upon that subject. In reference to this question, I concur in the conclusion of the Judiciary Committee, whose report in another case was yesterday read to the House.

Now, Mr. Speaker, in my opinion this House has no right to go back for six years and expel a member because of acts committed at that period.

[February 26, 1873.]

Mr. BINGHAM. Gentlemen in this connection have referred to Story. I do not propose to read at any great length from him. I am not unmindful of the fact that this lamented man, so full of learning, often crowded into his pages so much of the text of others with whose writings he was familiar that a doubt often arises as to his true and certain meaning. But I do not hesitate to say that every thoughtful man in America who reads the text of Story will come to the conclusion that upon the question under consideration this House has no power whatever over any member of this body except the power expressly given by the text of the Constitution and by the laws of the United States passed under the Constitution. Story says, quoting from the Constitution: "Each House may determine the rules of its proceedings, punish its members for disorderly behavior." Punish *its* members, not the members of another House, but punish its members; not a member of the Fortieth Congress; not a member of the Thirty-ninth Congress; not a member of the Thirty-eighth Congress; "punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member." * * * "No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist it would be utterly impracticable to transact the business of the nation either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory unless it was coupled with a power to punish for disorderly behavior or disobedience to those rules."

Now, how could a man who was not a member of your body at all be guilty of misbehavior as a member of it or of disobedience to your rules before he came to be a member of it? It is useless to waste words upon such a proposition. Story goes on: "And as a member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamor, the power to expel for very aggravated conduct was also indispensable, not as a common but an ultimate redress for the grievance."

From whom? From a member of this body. For what? For misconduct, for crime if you please, too grievous to be put up with or borne while he was a member of that body. Gentlemen have referred to Rawle. Rawle refers to the same provision of the Constitution, and says:

"It has not been precisely settled what must be the disorderly behavior to incur punishment, nor what kind of punishment is to be inflicted; but it can not be doubted that misbehavior out of the walls of the House or within them when it is not in session would not fall within the meaning of the Constitution."

There is an authority cited by the committee. I think it goes too far, but it does not sustain the committee. I stand upon the ground that a member of this body during his membership may be expelled for any crime he may have committed against the laws of his country or against the rules and authority and dignity of this House after his election to this, not to another House. And that is as far as, under the obligations of my oath, I dare go. And I venture the opinion that when the question comes to be understood by the American people, that will be as far as any House of Representatives dare go.

GEORGE Q. CANNON.

But we think a more significant case still than that—significant in more senses than one—was the case of Cannon, in the Forty-third Congress. George Q. Cannon had the certificate as Delegate from Utah. A feeble effort was made to prevent his being sworn in. There was no evidence that he had ever violated any law, and nothing more than a moral objection could be urged against him. Maxwell contested his seat on the theory that Cannon was ineligible, and that he, Maxwell, being the only eligible candidate, was therefore elected. His pretensions on that ground were promptly disposed of against him.

The committee brought in a report that Cannon was elected and returned. This was in May, 1874. The minority of the committee insisted that he was entitled to the seat which he occupied. The resolution of the minority was adopted by a small majority, as against the resolution that he was elected and returned. Some of the best, strong-

est, and ablest men in the House voted no on that proposition; among them, of those who are now in public life, were Burrows, Frye, Harmer, and Hoar.

The suggestion was made that the proper proceeding was to expel, if Cannon was a polygamist; and the House permitted itself to believe, since Cannon was already in his seat, that that was the proper course.

A committee was at once appointed to examine into the question as to whether or not he was a polygamist, in order that they might expel him.

That committee was appointed in May, 1874, and on the 21st day of January, 1875, it reported in favor of what they called exclusion, but what was, of course, expulsion, because he was already in. They found he was a polygamist. The minority report, which accompanied the majority report, opposed expulsion on three grounds.

First. Because the House had in the preceding session declared that Cannon was *entitled* to a seat.

Having declared that he was entitled to his seat, it would be inconsistent to expel him, since there was no intervening circumstance which changed his status at the date of this report from his status when the House confirmed his right to a seat.

Second. That when Utah was created as a Territory it was a Mormon community, and Congress knew it and had a right to expect that it would send a Mormon delegate. It, therefore, had no right to protest now that the Mormon had come.

Third. We here quote the language of the minority—

But a graver question than those we have considered is the question whether the House ought, as a matter of policy or to establish a precedent, expel either a Delegate or a Member on account of alleged crimes or immoral practices unconnected with their duties or obligations as Members or Delegates, when the Delegate or Member possesses all the qualifications to entitle him to his seat.

There is more along the same line in this report.

Three weeks later this case was called up for consideration. Mr. Laughridge, of Iowa, raised the question of consideration, and the House refused to take it up by an overwhelming vote, only 21 members voting in favor of it.

Thus we see that the House, which thought in May that it might purify itself or protect itself just as well by expulsion at a later day, discovered that the very action which it had taken was turned into a weapon against it when it undertook at that later day to bring about expulsion, and Cannon sat until the end of his term. Will history repeat itself? It took the House several years to rid itself of Cannon. Will it be as deliberate in this instance?

SCHUMACHER AND KING.

This was a case where Schumacher and King, members of the House, were charged with corruption in connection with the China mail service.

The report of the Committee on the Judiciary was filed August 9, 1876.

In declaring against the right of expulsion it said:

Your committee are of opinion that the House of Representatives has no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. This is purely a legislative body and entirely unsuited for the trial of crimes. The fifth section of the first article of the Constitution authorizes "each House to determine the rules of its proceedings, punish its members for disorderly behavior,

and, with the concurrence of two-thirds, expel a member." This power is evidently given to enable each House to exercise its constitutional function of legislation unobstructed. It can not vest in Congress a jurisdiction to try a member for an offense committed before his election; for such offense a member, like any other citizen, is amenable to the courts alone. Within four years after the adoption of the first ten amendments to the Constitution, Humphry Marshall, a Senator of the United States from Kentucky, was charged by the legislature of his State with the crime of perjury, and the memorial was transmitted by the governor to the Senate for its action. The committee to whom it was referred reported against the jurisdiction of the Senate, and say:

"That in a case of this kind no person can be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and that in all such prosecutions the accused ought to be tried by an impartial jury of the State or district wherein the crime shall have been committed. Until he is legally convicted, the principles of the Constitution and of the common law concur in presuming that he is innocent. And they are also of the opinion that, as the Constitution does not give jurisdiction to the Senate, the consent of the party can not give it, and that therefore the said memorial ought to be dismissed."

The minority report did not combat the position of the majority in so far as this case is concerned, as the following extract will show:

That the only question now presented to the House is the question of jurisdiction, which question arises under the last clause of section 5 of Article I of the Constitution:

"Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

It will be seen that there are no words of limitation on the power to expel, which seems to have been left to the good sense and discretion of each House. In other words, does not the Constitution refer rather to the fitness of the member to hold the office, resting on considerations of public justice and policy, than to the time of his election? Yet the undersigned do not deny but that there are limitations on the power of this House arising from the circumstances of particular cases, and the relations of this House to the constituency of an accused member; therefore, as will be seen, the undersigned need not go further in this case than to assert jurisdiction, because the offenses complained of were not known to the constituents of the members in question until after their election.

If the House takes the action which the minority of the committee insists it ought to take, it will, for the first time in its history, part with a most beneficent power which it has often exercised—a power that ought rarely to be exercised, but which the House has never declared it did not possess.

Mindful of the gravity of the question and realizing the responsibility imposed upon us, we recommend the adoption of the following resolution:

Resolved, That under the facts and circumstances of this case, Brigham H. Roberts, Representative-elect from the State of Utah, ought not to have or hold a seat in the House of Representatives, and that the seat to which he was elected is hereby declared vacant.

ROBERT W. TAYLER.

CHARLES B. LANDIS.

PAGE MORRIS.

ROMEO H. FREER.

SMITH MCPHERSON.

SAMUEL W. T. LANHAM.

ROBERT W. MIERS.

VIEWS OF THE MINORITY.

The undersigned members of the special committee appointed to investigate and report upon the prima facie and final right of Brigham H. Roberts to a seat in the House as the Representative from Utah, being unable to agree with the conclusions of the committee as to the constitutional questions involved, very respectfully submit our views.

Finding that Mr. Roberts has been and is now a polygamist, unlawfully cohabiting with plural wives, if the House of Representatives is for that reason of the opinion that he ought not to be a member thereof, what course should it rightfully pursue under the Constitution, the supreme law of the land—exclude him or expel him? If he is to be excluded, it must be because he is for such reason legally ineligible or disqualified. The purpose is to consider the question of constitutional right, not of arbitrary power, as it is conceded that the House has that power to exclude, with or without reason, right or wrong. The exercise of such a power, without constitutional warrant, would simply be brute force, a tyrannous exercise of power, unreviewable by any tribunal.

The Constitution, article 1, section 5, provides that—

Each House shall be the judge of the elections, returns, and qualifications of its own members.

As to qualifications of Representatives, it provides:

No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. (Constitution, article 1, section 2.)

Is it seriously contended that this House can of its own motion, by its own independent action, create for the purposes of this case a legal qualification or disqualification? This House alone can not make or unmake the law of the land. Before any one of its acts can become law it must be concurred in by the Senate and approved by the President, or passed by two thirds of each House over his veto. It is quite clear that the House, by its independent action, can not, if it would, make for this case any disqualifying regulation that would have the force of law.

The qualifications being negatively stated in the Constitution, it is said that Mr. Roberts is ineligible under the provisions of the act of March 22, 1882, section 8, known as the Edmunds law, viz:

SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States.

The existence of the disqualification in this act is predicated not upon a conviction of or as a punishment for the offenses of polygamy or unlawful cohabitation, but simply as incident to the existence of those conditions.

FIRST.

It is a very grave question as to whether Congress can, by a law duly enacted, add to the qualifications negatively stated in the Constitution. There is no decision of the United States Supreme Court directly or indirectly construing this provision. There is no decision of any State court directly in point. In *Ohio v. Covington* (29 Ohio Stat., 102), relied upon, the court were passing upon the right of the defendants to hold the offices of police commissioner and member of the board of health for the city of Cincinnati. The constitution provided that—

No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector.

The court distinctly held that—

The defendants, as members of the board of police commissioners * * * are officers for whose election and appointment no provision is made in the Constitution of the State or of the United States—

And were therefore such as the legislature had, by the express provisions of the Constitution, authority to create. When the legislature created the offices in question, it attached to them the condition that each officer should be—

A resident citizen for three years of the city in which he shall be appointed, and able to read and write the English language.

The offices in question were creatures of the statute, and not of the constitution. It is familiar law that whatever office the legislature creates it can create with such conditions, limitations, qualifications, and restrictions as it sees fit to impose; and this was all that it was necessary for the court to say in that case in upholding the validity of the statute. It is true that it did go further than that, further than the case required, and held that no implication arose, from the negative language of the constitution, that other qualifications could not be added by the legislature. In so far, however, as the opinion goes beyond the requirements of the case, it certainly is doubtful authority. It should be stated that this case has been fully approved in the recent case of *Mason v. State* (58 Ohio St., 54).

The case of *Darrow v. People* (8 Colo., 420), relied on, is also subject to the same criticism as *State v. Covington*, as the office there considered was that of alderman, the creature of the statute.

The case of *People v. May* (3 Mich., 598) is relied upon to support the proposition that statutory additions may be made to the constitutional qualifications. We submit that so far as that case is an authority it is directly in point against the contention. In that case a layman had been elected to an office designated in the constitution as “a prosecuting attorney.” The question was whether any person not a lawyer was eligible to the office. It was objected that to hold that eligibility was confined to the legal profession would be adding a qualification in violation of the constitution.

The court held that they must give to the words “a prosecuting attorney” such a construction as would be consistent with the sense in which they were used, and that the obvious intention of the constitution was that the office should be held by an attorney at law. Certainly not a very violent inference. This did not add a qualification; merely held that one already existed. But the court did not stop there, or leave their position as to the right to add qualifications open to doubt, as they emphatically said:

We concede to the fullest extent that it is not in the power of the judiciary or even the legislature, to establish arbitrary exclusions from office, or annex qualifica-

tions thereto, when the Constitution has not established such exclusions, nor annexed such qualifications. But it is begging the question to assume that the act of construing the Constitution has that effect (610).

It is not perceived how this case gives any aid or comfort to those who promote the contention adverted to.

The remark of the court in *McCulloch v. Maryland* (4 Wheaton, 416), purely a dictum made by way of illustration, when discussing the powers reasonably to be implied from the concise and general provisions of the Constitution, necessary, appropriate, and plainly adapted to effectuate its purposes, that—

He would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution, such other oath of office as its wisdom might suggest—

does not impress us as entitled to much weight in construing a provision of the Constitution which the court was not considering and to which the doctrine “that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution,” can have little, if any, application. This seems to us more obvious when it is noted that the oath prescribed by the Constitution is simply to support the Constitution. In the line of the doctrine stated it might be said that an oath to faithfully discharge the duties of the office was a proper “means for their execution,” and one reasonably involved in the implied powers.

It is suggested that the existence of the clause “but no religious test shall ever be required as a qualification to any office or public trust under the United States,” which is found in Article VI of the Constitution, in a paragraph relating wholly to oaths, has a direct tendency to show that the previous paragraph in Article I, section 2, prescribing qualifications, was not intended to be exclusive, inasmuch as this paragraph in Article VI is said to add a qualification which is entirely inconsistent with the idea that the prior paragraph was exclusive. Reflection, however, leads us to the conclusion that this paragraph in Article VI has no proper connection with or relation to the paragraph in Article I, section 2. We think the word “qualification” in connection with “religious test” is used in an entirely different sense from that in which the word “qualification” is used in Article I, section 5. It is clearly applied to and is a description of the “religious test,” and must be construed in connection with that phrase, no “religious test * * * as a qualification.” The clause is found in a paragraph which relates solely to the oath to be administered.

Qualification, when used in discussing the elements which a member-elect must possess in order to be entitled to enter upon the office, is synonymous with eligibility. This is substantially the definition of legal lexicographers—Bouvier, Rapalje, and Anderson. “The recognized legal meaning in our constitutions” of the word “test” “is derived from the English test acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding of framers of constitutions.” (*Attorney-General v. Detroit Common Council* (58 Mich., 217); *Anderson’s Dictionary of Law*, “Test;” “Test act;” “Test oath.”)

The English test acts (25 Geo. II, c. 2) required persons holding office within six months after appointment to take the oath of allegiance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England. The qualification of a “religious test” thus prohibited relates clearly

to something "required" to be done by an officer when entering upon or after having entered upon the office, and not to qualifications or elements of eligibility which he must possess or disqualifications or elements of ineligibility which he must not possess before he can enter upon the office. Qualification or disqualification, eligibility or ineligibility is a status that either does or does not exist at the time of entering upon the office. The qualification of a religious test has no existence as a status; it is not a status, it is simply a condition to be performed. No member can change his status as to the elements of eligibility or qualification as defined in Article I, section 2, at the time of entering upon the office; but if the qualification of a religious test existed every member could, if his conscience were sufficiently elastic, comply with the test. One is predicated upon the past and the other upon the future. One relates to things done or not done; the other to things to be done.

An examination of the constitutional history of this clause fully corroborates this view. The last paragraph of Article VI, with the exception of the clause as to the test oath and the word "affirmation" (which was added by amendment), is substantially Article XX of the first draft of the Constitution, as reported by the committee of detail August 6, 1787. (The Madison papers, containing debates on the Confederation and Constitution, vol. 5, p. 381; Elliot's Debates.)

The clause in question first appears in the proceedings August 20, 1787, and was introduced by Mr. Pinckney, as an independent proposition to be referred to the committee of detail, and then read:

No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States. (Ibid., 446.)

That the word "qualification" as here used related to the oath, and to nothing else, is too clear for argument, and that it was not used in the sense in which it was used in Article I, section 5, is likewise clear. This conclusion is emphasized by the fact hereafter noted that it was at one time proposed, by an independent constitutional provision, to confer upon the legislature express authority to add one qualification. The effort failed, and it is hardly to be supposed that the Constitution makers would do indirectly by this clause what they had directly decided not to do. Later, when Article XX was being considered, Mr. Pinckney moved as an amendment to the article his original proposition in precisely the language in which it now appears in the Constitution. (Ibid., 498.)

There is nothing in the proceedings to indicate that by a change in the phraseology he intended any change in its meaning. The selection by him for amendment of the clause as to the oath, and not that relating to the qualification, is in harmony with this view.

For these reasons it seems to us that the clause relating to religious tests can serve no legitimate purpose in enlarging that prescribing the elements of eligibility.

With the exception of *Barker v. The People* (20 Johns. (N. Y.), 457), which is affirmed in *Barker v. The People* (3 Cowen, 636) and *Rogers v. Buffalo* (123 N. Y., 173), hereinafter discussed, we do not find any case construing a similar constitutional provision which sustains the right to add qualifications.

Among the elementary writers, Throop on Public Offices, section 73, says:

The general rule is that the legislature has full power to prescribe qualifications for holding office, in addition to those prescribed by the Constitution, if any, provided that they are reasonable, and not opposed to the constitutional provisions, or to the spirit of the Constitution.

But he cites no authority to sustain his text as to constitutional offices.

Cushing (Law and Practice of Legislative Assemblies, p. 195, sec. 477) says:

To the disqualifications of this kind, may be added those which result from the commission of some crime, which would render the member ineligible,

And cites no authority.

Burgess, in his work on Political Science and Constitutional Law, without giving any authority, says:

I do not think that either of these bodies can add anything, in principle, to these constitutional qualifications. Certainly the Commonwealths can not add anything in principle or in detail. They have attempted to do so, but Congress has always disregarded these attempts. If the Congress can add anything by law, or if either House can do so through the power of judging of the qualifications of its members, it must be something already existing, by reasonable implication, in these constitutional qualifications. For example, I think it certain that either House might reject an insane person, i. e., might require sanity of mind as a qualification; or might exclude a grossly immoral person, i. e., might require fair moral character as a qualification. (Vol. II, p. 52.)

The Commonwealths can not add to or subtract from these qualifications. On the other hand, the Congress may, by law, or either House may, in the exercise of the power to judge of the qualifications of its members, make anything a disqualification that is reasonably implied in the constitutional provisions in regard to this subject. Certainly they may make the corrupt use of his powers by a legislator a disqualification; and they have done so. (Vol. II, pp. 52, 53.)

The case of Whittemore, in the Forty-first Congress, is suggested as a legislative precedent for the right to exclude. We have examined that case with care, and we feel bound to say that we do not think it entitled to any weight as a precedent. The argument upon which it was based shows the action of the House to have been unwarranted and ill advised in excluding Whittemore. The only speeches made in support of the proposition were by Mr. Logan. He does not in any way refer to the one great legal question involved, as to whether Congress, to say nothing of the House, acting alone, had the power to add to the qualifications specified in the Constitution, and that question was not raised during the debate, although at that time (1870) several State courts, one at least, had discussed it, *People v. Barker* having been decided in 1824.

The House had, apparently, never heard that there was such a question. The only provision of the Constitution that could possibly justify the action of the House, that constituting the House the judge of the "election returns and qualifications of its own members," was not referred to directly or indirectly, and if the debate is the criterion, the House acted without any reference to it whatever. The clause stating the qualification was incidentally referred to once. Indeed, they apparently acted upon an entirely different provision, that does not relate to exclusion or determining eligibility or qualifications, and Mr. Logan distinctly based his case upon it when he says:

I base my opinion, first, upon the Constitution of the United States, which authorizes Congress to prescribe rules and regulations for the government of their members, and provides that by a two-thirds vote either House may expel anyone of its members without prescribing the offenses for which either House may expel.

He then proceeded to make this gratuitous and unwarranted assumption:

This being the theory with which I start out, I then assume that where the House of Representatives has power to expel for an offense against its rules, or a violation of any law of the land, it has the same power to exclude a person from its body.

Without giving any attention to the legal distinctions involved, or even referring to the constitutional right of passing upon qualifications, or adverting to the fact that exclusion is the act of a majority and expulsion of two-thirds, he begs the whole question and assumes their identity. He quotes a statute which makes a disqualification to hold office absolutely dependent upon a conviction, and then assumes it disqualified Whittemore, although there had been no conviction. He admits there was no Congressional precedent for the action which he proposed. He cites the Wilkes case in the English Parliament as a precedent, when, as he states it, that case was directly in point against him. Wilkes, he says, was elected four successive times to the same Parliament, three times without opposition and the fourth time against an opposing candidate. Three times he was expelled. The fourth time his opponent was seated. Neither time, according to his statement, was Wilkes excluded.

Just how that case could be an authority for excluding as against expelling Whittemore we can not see. These considerations (and many more could be suggested), in view of the fact that the House, under Mr. Logan's lead, absolutely refused to allow any committee to examine, for the information of the House, the legal questions involved or to have the case referred to any committee—though such a course was desired by such men as Poland of Vermont, Farnsworth of Illinois, and Schenck and Garfield of Ohio—and would not allow Schenck and Garfield to be heard on the law for even ten minutes each, deprive this case, in our opinion, of all weight as a precedent.

As might perhaps be expected, Mr. Logan's statement of the Wilkes case was by no means accurate. It is extremely interesting, as well as important, to note that the whole history of that case is a striking condemnation of the position of Mr. Logan. While the record is not full, and the distinction between the power of exclusion and that of expulsion was not emphasized in argument, the result makes it the conspicuous proposition. On the occasion of Wilkes' third election the House of Commons adopted this resolution:

That John Wilkes, esq., having been in this session of Parliament expelled this House, was, and is, incapable of being elected a member to serve in the present Parliament. (Cavendish, Debates, vol. 1, p. 231.)

In opposing the adoption of this resolution, Edmund Burke said:

I rise to obtain some information upon this great constitutional point. You are going to make a disqualification of a member to sit in Parliament; you are going to make a disqualification contrary to the unanimous opinion of a whole county. Words have been thrown out by the noble lord importing that this is the law of Parliament. Is that, sir, a fact? Is this the law of Parliament? I wish to have that law established on the ground which establishes all laws. Has it acts of Parliament? It has none. Has it records? Has it custom? I have not heard a variety of precedents used. (Ibid., p. 231.)

Here it will be seen that of all who took any part in that debate, the only man who lives in history made the specific point that the House of Commons was adding, in violation of law, by its own action, a disqualification in Wilkes' case. The resolution which declared Wilkes ineligible in effect was adopted by an overwhelming majority February 17, 1769. Before this he had been twice expelled. May 3, 1782, when reason had resumed its sway and the House was no longer overawed by power, a resolution revising in emphatic terms a portion of its prior action in the Wilkes case was adopted. It is significant that it did not attempt to impeach the propriety or validity of the action of the House in twice expelling Wilkes, but it wholly reversed its action in establish-

ing a disqualification and then excluding him therefor. The resolution adopted on the motion of Wilkes himself reads:

That the said resolution [that of February 17, 1769, declaring him incapable of being elected] be expunged from the journals of this House, as being subversive of the rights of the whole body of electors of this Kingdom. (Hansard, vol. 22, p. 1409.)

That the significance of this resolution and its vital importance, as declaring the lack of power of one branch of the legislature to add a qualification, was fully appreciated at that time, clearly appears from the discussion on its adoption. While Fox conceded the principle, he thought the resolution unnecessary, as it would not have the force of law and would not change the doctrine. The Lord-Advocate agreed with Mr. Fox and spoke principally to the "idea of excluding anyone from a seat in that House by a mere resolution of the House, and without the concurrence of the other branches of the legislature. Such a resolution would be contrary to all law, and to the very spirit of the constitution, according to which no one right or franchise of an individual was to be taken away from him but by law." (Ibid, p. 1411.)

May, in his able work on Parliament, very clearly states the law when he says:

"But, notwithstanding their extensive jurisdiction in regard to elections, the Commons have no control over the eligibility of candidates, except in administration of the laws which define their qualifications." (May on Parliament, p. 53.)

Thus at that early day was the distinction between exclusion and expulsion emphasized by the House of Commons, and the first legislative precedent established against the pretended right to add a disqualification for office, in violation of law.

So far as the Edmunds Act, which does not require a conviction for disqualification, goes, the case of *Barker v. The People* (3 Cowen, 686) is distinctly adverse to the conclusion of the majority of the committee. The court were passing upon the validity of a statute authorizing a judgment rendering a party ineligible to office on a conviction for sending a challenge to fight a duel, and the court sustained the judgment in the following expressive language:

Whether the legislature can exclude from public trusts any person not excluded by the express rules of the Constitution, is the question which I have already examined; and according to my views of that question, there may be an exclusion by law, in punishment for crimes, but in no other manner and for no other cause.

Again—

I therefore conceive it to be entirely clear, that the legislature can not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution has not required.

It appeared that no qualification whatever in respect to members of the assembly was required by the Constitution, and the court said, *arguendo*, that a regulation requiring a member of the assembly to be a freeholder "would be an infringement of the Constitution." There was a blank, not even a negative provision.

We do not understand that *Rogers v. Buffalo* (123 N. Y., 173), in any way affects the authority of *Barker v. The People*, *supra*, but on the other hand cites it with approval, and clearly distinguishes from it the case which they were deciding. They were construing a statute which created a board of civil-service commissioners, and after citing and assenting to *Barker v. The People*, *supra*, said (p. 184):

But, in our judgment, the legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor to a general regulation requiring qualification not mentioned in the Constitution.

The opinion thus clearly eliminated the constitutional question as to eligibility, and determined the case upon another ground.

Sound reason does not sustain this claimed right to exclude. If the construction contended for is admitted it must be conceded that the power of adding qualifications is unlimited, as there is nothing in the Constitution which circumscribes it. The suggestion in *Barker v. People* that the only power to add is in case of a conviction of crime is purely arbitrary and gratuitous, and absolutely no constitutional authority is given therefor. The rigid confinement by the court of the right to break away from the Constitution to a conviction for crime must have been in the nature of expiation, a satisfying of the judicial conscience for the departure thus made from the Constitution. If the power exists, it must be unlimited, and, therefore, while you can not take from or narrow the two elements first specified, you have unlimited power to add to them. For instance, unless a man is at least 25 years of age he is not eligible, therefore the Constitution does not undertake to say that a greater age may not be required. In fact, the necessary inference is that only the minimum limit as to age has been established, and the legislature has unlimited power to add to that qualification, and hence may require all Representatives to be 50 years of age. The same course could be pursued with reference to the seven years' citizenship clause: you can not act within the domain to which the Constitution has confined itself. Outside of it, you can do anything. We can not indorse any such doctrine, or help to work it into a decision of the House in the case now under consideration.

The consequences just suggested are the logical result of the theory, and while the illustrations are extreme they are the best test of the principle. Would anyone feel justified in asserting that any such change in the age qualification was either contemplated or is possible? Yet it must have been, and must be, if the argument is sound.

Inasmuch as the argument of John Randolph in 1807 is thought to be able, ingenious, and persuasive upon this clause, we have taken occasion to examine it, and find him expressing "extreme surprise" because the Committee on Elections had so construed this clause as to restrict "the States from annexing qualifications to a seat in the House of Representatives. He could not view it in that light. Mark the distinction between the first and second paragraphs. The first is affirmative and positive." Then he draws a contrast between the affirmative and negative provisions. He conceded that if the Constitution had read in the affirmative it would have settled the question of qualification and been exclusive. He does not appear to have gone for light to the proceedings of the Federal Convention. The House in that case, *Barney v. McCreery* (Digest Election Cases, vol. 1, page 157), decided against his contention, and his proposition has long been obsolete.

The whole case of the right to add qualifications is based upon the fact that such qualifications as are prescribed are negatively expressed. The juxtaposition of the affirmative and negative clauses, it is said, has some significance. It does not appear that any of the courts' elementary writers or lawyers that have had occasion to insist upon this, have ever availed themselves of the debates in the Federal Convention for the purpose of ascertaining the intention of the framers of the Constitution. While this precaution has not hitherto been observed, common fairness and a due regard for a thorough investigation require that these great men, whose handiwork has so well withstood the assaults of time, should now and upon this important question be allowed to speak for themselves. An inquiry as to the origin of this clause will

not only be interesting and instructive, but possibly determining. This course is stated by Cooley to be proper. (Cooley's Constitutional Limitations, p. 80.)

And Story, in his great work on the Constitution, makes constant use of the debates in the Federal Convention.

In the report of the committee of detail giving the first draft of the Constitution, August 6, 1787 (Madison Papers, etc., vol. 5, p. 376), the paragraph in question appears as an independent section, i. e., section 2, Article IV, and reads:

SEC. 2. Every member of the House of Representatives shall be of the age of twenty-five years at least, shall have been a citizen of the United States for at least three years before his election, and shall be at the time of his election a resident of the State in which he shall be chosen.

It is significant that this section is affirmative, and is therefore exclusive, as is conceded, in its character. It is important to inquire whether the change in phraseology was made for the purpose of changing its legal effect. That it was understood by the framers of the Constitution to be exclusive will, we think, clearly appear. The first consideration which indicates this is the incorporation in the same draft of the Constitution of section 2 of Article VI, which reads:

SEC. 2. The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.

The inference that the framers of this draft must have understood that section 2 of Article IV was exclusive, and that in order that the legislature might have any power at all over qualifications it was necessary to confer it by a later and specific provision, is imperative and obvious. The debates confirm this idea.

Madison opposed the proposed section 2, Article VI, "as vesting an improper and dangerous power in the legislature. The qualifications of elector and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate those of either, it can by degrees subvert the Constitution.

"A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected, as the number authorized to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their constituents, there was the same reason for being jealous of them as there was for relying upon them with full confidence when they had a common interest. This was one of the former cases."

Gouverneur Morris moved to strike out "with regard to property," in order, as he said, "to leave the legislature entirely at large"—precisely what is now claimed without any such constitutional provision. This was objected to by Mr. Williamson on the ground that should "a majority of the legislature be composed of any particular description of men—of lawyers, for example—which is no improbable supposition, the future elections might be secured to their own body."

Mr. Madison further observed that "the British Parliament possessed the power of regulating the qualifications both of the electors and the elected, and the abuse they had made of it was a lesson worthy of our attention. They had made changes in both cases, subservient to their own views of political or religious parties." (Madison Papers, etc., vol. 5, p. 404.)

This article was not agreed to.

Note the significance and primal importance of Mr. Madison's assertion that "the qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution," as otherwise the legislature might "subvert the Constitution."

His insistence upon these grounds prevented the adoption of the provision that only conferred this power upon the legislature in one particular, and the convention thus evidently adopted his views as to the exclusiveness of the provisions of Article IV, section 2.

Again, when the original proposition which resulted in Article IV, section 2, was under discussion prior to the draft reported by the committee of detail, Mr. Dickinson opposed the section altogether, expressly because it would be held exclusive, saying he "was against any recitals of qualifications in the Constitution. It was impossible to make a complete one; and a partial one would, by implication, tie up the hands of the legislature from supplying omissions." (Ibid., p. 371.)

Mr. Wilson took the same view, saying, "Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters." (Ibid., 373.)

When this section in the draft was under discussion, after "three" had been stricken out and "seven" inserted as to citizenship, Alexander Hamilton moved "that the section be so altered as to require merely citizenship and inhabitancy," and suggested that "the right of determining the rule of naturalization will then leave a discretion to the legislature on the subject which will answer every purpose." (Ibid, p. 411.)

Here it is clear that, as Hamilton construed this provision, without this latitude as to naturalization, the legislature had no discretion or power. From the affirmative language of this provision, then, as it stood in the report of the committee of detail, and the understanding of the framers of the Constitution, it is clear that it was exclusive. This section was not changed to the negative form by amendment, or as the result of any debate. In its affirmative form with other sections that had been finally acted upon, and their construction and terms definitely settled, it was referred to a committee "to revise the style of and arrange the articles which had been agreed to by the House," and this committee consisted, among others, of Mr. Hamilton, Mr. Gouverneur Morris, and Mr. Madison. (Ibid, p. 530.)

This committee had no power to make any change in the legal effect of any of the clauses submitted to them. They were simply "to revise the style of and arrange." Certainly, with his very pronounced views, Mr. Madison would not have made a change in Article IV, section 2, that would, in his opinion, have placed it within the power of the legislature to "subvert the Constitution."

Yet, when the committee reported the Constitution as it now stands, Article IV is rearranged so as to be included in Article I, and the original affirmative section 2 of Article IV appears in the negative form as the second independent paragraph of Article I, somewhat changed, it is true, but in no sense connected with or dependent upon the preceding paragraph, which, with an improvement in phraseology, is section 1 of Article IV of the draft. This reference to the original sources of information, we submit, deprives the argument sought to be derived from the juxtaposition of all significance. (Ibid, p. 559.)

An examination of the finished work discloses the fact that the rearrangement and changes in phraseology by the committee were extensive. The object unquestionably was to make the arrangement more orderly and lucid and the language more perspicuous and felicitous.

To hold that in any particular any change was intended to be made in the legal effect is to impeach the integrity of men whose characters are of the most illustrious in our history. To assert that they unwittingly made such changes is a much more grievous assault upon their intelligence and ability.

Moreover, we are not left to inference as to how this clause in its present form was interpreted by the most eminent of the framers of the Constitution. The *Federalist*, as is well known, was published while the Constitution was undergoing public discussion, and while it was being ratified by the States. It had been ratified by six States only when the numbers of the *Federalist* hereafter referred to appeared. The author of No. 52 evidently assumes that all of the qualifications of representatives had been "very properly considered and regulated by the convention."

He says:

The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A Representative of the United States must be of the age of 25 years; must have been seven years a citizen of the United States; must at the time of his election be an inhabitant of the State he is to represent, and during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the Federal Government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth or to any particular profession of religious faith.

If the learned author had supposed that any limitations in addition that might appeal to the caprice of a legislature could be added, he would hardly have used the term "these reasonable limitations," as he evidently did, as descriptive of all of the limitations to be imposed. In No. 57 a general reference to this clause is made, which evidently proceeds upon the idea that the qualifications to be required are stated in the Constitution. It reads: "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of the country. No qualification of wealth, of birth, of religious faith, or of civil professions is permitted to fetter the judgment or disappoint the inclination of the people."

How could he know that, unless the Constitution settled the qualifications? The authorship of these two numbers is in doubt between Madison and Hamilton. Hamilton is conceded to be the author of No. 60, and with many no authority is greater than his; and this, so far as his authority goes, settles it beyond cavil. He says:

The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property, either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the legislature.

This unequivocal declaration was made after the negative form of expression had been adopted; made concerning the provision as it now exists in the Constitution. It is not contended that the *Federalist* was a determining factor in securing the ratification of the Constitution, though it was undoubtedly published for that purpose. So far, however, as this clause weighed in the public mind, as this is the only construction that appears to have been placed upon it, it may be inferred that this construction was adopted by the States which afterwards ratified.

In the light of these facts it is to be deplored that exigencies arise which are supposed to justify a construction in direct conflict with the

intention and interpretation of those who framed and assisted in ratifying the Constitution. It seems clear that the negative form of expression has no interpretive significance, and as it affords no support for the proposition which involves the right to add qualifications, that proposition must fall with the erroneous construction upon which it is based.

The great weight of the other authorities sustains this conclusion.

In *Thomas v. Owens* (4 Maryland, 223), the court said:

Where a constitution defines the qualifications of an officer, it is not within the power of the legislature to change or superadd to it, unless the power be expressly, or by necessary implication, given to it.

And in *Page v. Hardin* (8 Ben. Mon., 661), the court said:

We think it entirely clear that so far as residence is to be regarded as a qualification for receiving or retaining office, the constitutional provision on the subject covers the whole ground, and is a denial of power to the legislature to impose greater restrictions.

In *Black v. Trover* (79 Va., 125), also, the court said:

Now, it is a well-established rule of construction, as laid down by an eminent writer, that when the Constitution defines the qualifications for office, the specification is an implied prohibition against legislative interference to change or add to the qualifications thus defined.

Mr. Justice Story is conceded to be one of the greatest authorities upon the construction of the Constitution, and upon this point he states the law as follows:

It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others. (Story on the Constitution, sec. 625.)

Cooley certainly stands equal in authority to Story, and he says:

Another rule of construction is that where the Constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the supreme court of Maryland, that where the Constitution defined the qualifications of an officer, it was not in the power of the legislature to change or superadd to them, unless the power to do so was expressly, or by necessary implication, conferred by the Constitution. (Cooley's Constitutional Limitations, page 78.)

Cushing, as against his former statement, says:

The Constitution of the United States having prescribed the qualifications required of Representatives in Congress, the principal of which is inhabitancy within the State in which they shall be respectively chosen; leaving it to the States only to prescribe the time, place, and manner of holding the election; it is a general principle that, neither Congress nor the States can impose any additional qualifications. It has therefore been held, in the first place, that it is not competent for Congress to prescribe any further qualifications, or to pass any law which shall operate as such. (Cushing on Law and Practice of Legislative Assemblies, second edition, p. 27, sec. 65.)

John Randolph Tucker, one of the latest writers on the Constitution, and an able one, is explicit on this point:

Nor can the Congress nor the House change these qualifications. To the latter no such power was delegated, and the assumption of it would be dangerous, as invading a right which belonged to the constituent body, and not to the body of which the representative of such constituency was a member. (Tucker on the Constitution, 394.)

The principle that each House has the right to impose a qualification upon its membership which is not prescribed in the Constitution, if established, might be of great danger to the Republic. It was on this excuse that the French Directory procured an annulment of elections to the Council of Five Hundred, and thus maintained themselves in power against the will of the people, who gladly accepted the despotism of Napoleon as a relief. (Foster on the Constitution, p. 367.)

It is a fair presumption that where the Constitution prescribed the qualifications it intended to exclude all others. (Paschal's Annotated Constitution, second edition, p. 305, sec. 300.)

Where the Constitution prescribed the qualifications for an office, the legislature can not add others not therein prescribed. (McCrary on Elections, sec. 312.)

McCrary also takes the ground that statutory and constitutional provisions making ineligible to office any person who has been guilty of crime presuppose a conviction before the ineligibility attaches. (Ibid, p. 345.)

Paine, in his work on elections, takes the same view (p. 104-108).

Certainly the great weight of authority is against the right to add, even by law, to the qualifications mentioned in the Constitution.

SECOND.

If the right to add a disqualification by law be assumed, the disqualification imposed by the Edmunds Act does not apply to a member of Congress, and therefore does not affect Mr. Roberts. The only portion of the section that can be said to have any application to a member of the House of Representatives is that which declares that no polygamist, etc., shall "be entitled to hold any office or place of public trust, honor, or emolument, * * * under the United States." Unless a member of the House holds an office "under the United States," within the meaning of the Constitution and the law, there is no disqualification.

As to the nature of their offices, whether "under the United States" or otherwise, members of the House and Senate are evidently the same. The words "office" and "offices" occur in the Constitution and amendments twenty-three times, and the words "officer" and "officers" fifteen times, and, with the exception of possibly two instances, these terms are never used, either directly or indirectly, as relating to or in connection with a Representative or Senator.

One possible exception referred to is found in Article I, section 3, and reads:

Judgment in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit, under the United States.

The term "office" in the first clause, as to "removal from office," clearly does not relate to a member of either House, as it will be seen that the provisions as to impeachment do not apply to them. It would seem that a civil officer guilty of conduct that would justify impeachment ought not to be eligible to a seat in Congress, though unless the clause "office of honor, trust, or profit, under the United States" be held to include a member, he could not be disqualified thereby. Still, if a member is not the subject of impeachment, there is perhaps as much reason in exempting him from the disqualifications of impeachment.

The other possible exception is in Article I, section 9, paragraph 8: "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

Standing alone, we might understand the paragraph as broad enough and comprehensive enough to include members of Congress, but, taken with the other provisions of the Constitution—and they are numerous—wherein the like terms do not embrace or apply to Senators or Representatives in Congress, what support can this paragraph possibly afford to those who invoke it as authority for adding anything whatever to the prescribed qualifications of a Representative?

The clause in Article I, section 6, provides:

And no person holding any office under the United States shall be a member of either House during his continuance in office.

Here it is very clear that "any office under the United States" can not include a member, as otherwise it would be equivalent to a provision that no member of either House shall be a member of either House during his continuance in office—an absurdity. A clause in Article II, section 1, provides:

But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Here "Senator or Representative" and "person holding an office of trust or profit under the United States" are used in the alternative, or in contradistinction from each other. If they were one and the same, their separate enumeration was unnecessary. If identical, there would be no occasion to particularize "Senator or Representative."

If identical, the adjective "other" should have been used, so that the clause should read, "or person holding any other office of trust or profit under the United States," etc.

These observations apply to the following provisions:

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, etc. (Constitution, Art. VI.)

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, etc. (XIV Amendment, sec. 3.)

Article II, section 4—"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors"—has been construed by the only tribunal therefor known to the Constitution, the Senate sitting as a court of impeachment, which held that a Senator was not a "civil officer," and therefore was not liable to impeachment. It was the case of William Blount, a Senator, who was impeached before the bar of the Senate by the House of Representatives. In his plea he claimed that as a member of the Senate he was not one of the "civil officers of the United States," and on the 11th of February, 1797, the Senate announced its conclusion as follows:

The court is of the opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that said impeachment is dismissed. (Annals of Congress, vol. 8, p. 2319.)

Story concurs in this view. (Story on the Constitution, sec. 792.)

Who can be said to hold office "under the United States" was practically decided in *United States v. Germaine* (99 U. S., 508-512), where the court said:

The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when officers become numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.

In *United States v. Mouat* (124 U. S., 303-308), the *Germaine* case is cited and approved, the court saying:

In that case, it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department.

The same principle is affirmed in *United States v. Hendee* (124 U. S., 309-315).

If, then, "all its officers," "under the Constitution," are appointed in the manner above indicated, clearly a member of either House does not hold an office "under the United States," and the Edmunds Act can not apply.

If the first and second propositions were not conclusive upon the question of eligibility, it seems to us very clear that no ineligibility can be predicated upon section 8 of the Edmunds Act, upon the facts as they must be conceded to exist. A brief statement of the history of the legislation involved may be useful.

The Edmunds Act became a law March 22, 1882. Section 1 amended section 5352 of the Revised Statutes of the United States, and defined and prohibited polygamy. Section 3 defined and prohibited unlawful cohabitation, and reads as follows:

SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

Section 8, relating to eligibility to hold office, has already been quoted.

The Edmunds-Tucker Act, which became a law March 3, 1887, supplemented the Edmunds law, imposed penalties for various kindred offenses, dissolved the corporation known as the Church of Jesus Christ of Latter Day Saints, and contained, among other things, various provisions as to dower and the law of descent. With reference to eligibility to office it contained, among others, this paragraph, in the last part of section 24:

No person who shall have been convicted of any crime under this act, or under the act of Congress aforesaid, approved March twenty-second, eighteen hundred and eighty-two, or who shall be a polygamist, or who shall associate or cohabit polygamously with persons of the other sex, shall be entitled to vote in any election in said Territory, or be capable of jury service, or hold any office or emolument in said Territory.

It will be noticed that this act applied only to "office or emolument in said Territory." It did not go as far as the similar provision in the Edmunds Act and apply to "any office under the United States."

February 4, 1892, Chapter VII of the laws of the Territory of Utah was enacted. Section 1 defined and punished polygamy substantially as did section 1 of the Edmunds Act. Section 2, relating to cohabitation, in all material parts is an exact transcript of section 3 of the Edmunds Act. There is no provision whatever in this act relating to ineligibility to office by reason of any of these offenses. (Laws of Utah, 1892, p. 5.)

The enabling act, authorizing the people of Utah to form a constitution and State government, and to be admitted into the Union, became a law July 16, 1894. This act required the convention to provide by ordinance irrevocable without the consent of the United States and the people of the State—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited.

The constitution of Utah was adopted by the convention May 8, 1895, by the people November 5, 1895, and the proclamation of the President of the United States announcing the result of the election and admitting the State into the Union was issued January 4, 1896. Article III, ordinance of the constitution, contained the provision as to religious liberty and polygamous or plural marriages in the exact language of the enabling act. (R. S. Utah, 1898, p. 40.)

Article XXIV, section 2, of the constitution reads as follows:

SEC. 2. All laws of the Territory of Utah now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature. The act of the governor and the legislative assembly of the Territory of Utah entitled an "An act to punish polygamy and other kindred offenses," approved February 4, A. D. 1892, in so far as the same defines and imposes penalties for polygamy, is hereby declared to be in force in the State of Utah. (R. S. Utah, 1898, p. 67.)

This did not give the State of Utah any law making persons ineligible to any office by reason of polygamy or cohabitation, as no such provisions existed in the act of 1892, chapter 24, or in any of the "laws of the Territory of Utah."

Sections 4208 to 4216, inclusive, of the Revised Statutes of Utah (R. S. Utah, 1898, p. 899) are substantially the act of 1892. Section 2 of the act of 1892 and section 4209 of the Revised Statutes, relating to unlawful cohabitation, are precisely alike. This statute has not been changed.

The laws of the State of Utah, then, do not now impose and never have imposed any disqualification for holding office by reason of polygamy or unlawful cohabitation. Mr. Roberts was a resident of the Territory of Utah, and since its organization as a State has been a resident of the State of Utah. Under these circumstances we do not think that the disqualifications imposed by the Edmunds Act have had any operation as to him since the organization of the State of Utah. It is settled by an unbroken line of decisions that all Territorial Congressional legislation is superseded by the adoption of a State constitution and the organization of a State.

In discussing the effect of the adoption of the constitution of Louisiana upon the laws of Congress, the court, in *Permoli v. First Municipality* (3 How., 610), said:

So far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State constitution; nor is any part of them in force unless they were adopted by the constitution of Louisiana, as the laws of the State.

The case of *Strader et al. v. Graham* (10 Howard, 94) determines the same question, and says:

The argument assumes that the six articles which that ordinance declares to be perpetual are still in force in the States since formed within the Territory, and admitted into the Union. If this proposition could be maintained, it would not alter the question. For the regulation of Congress, under the old confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them. The ordinance in question, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State, nor give this court jurisdiction upon the subject.

But it has been settled by judicial decision in this court, that this ordinance is not in force.

The case of *Permoli v. The First Municipality*, 3 How., 589, depended upon the same principles with the case before us.

The same doctrine is held in *Pollard et al. v. Hagan* (3 How., 212).

It is approved by all of the court, from Chief Justice Taney to Judge Curtis, in *Dred Scott v. Sandford* (19 How., 490).

It is approved in *Woodman v. Kilbourne Manufacturing Company* (1 Abb. U. S., 162), opinion by Justice Miller, of the United States Supreme Court. *Columbus Insurance Company v. Curtenius* (6 McLean, 212).

This precise question, in the application to the State of Utah of a law of Congress which was not continued in force by any legislation, has been determined in *Moore v. United States* (85 Fed. Rep., 468).

The court were determining whether a law of Congress against unlawful combinations was in force in Utah, and held:

By its terms, the provision of the statute under which this indictment was found applies only to the Territories of the United States, and while it may yet be in full force within the Territories, it is clear that no prosecution could be maintained under it for entering into a combination or conspiracy in restraint of trade in Utah after the date of her admission as a State. * * * When Utah became one of the States of the Union, this statute ceased to be in force within its boundaries, unless, by appropriate legislation it was continued in force for the purpose of prosecuting violations thereof committed during the existence of a Territorial form of government. * * * The act of July 2 was not repealed by the enabling act, for it yet applies to the Territories of the United States. It ceased to be in force in Utah only because it was superseded by the constitution upon the admission of the State.

We have seen that there was no legislation of any kind continuing in force section 8 of the Edmunds Act, relating to disqualification. It is to be observed that this section does not undertake by its terms to operate within the limits of any State. It is expressly confined in its operation, by its terms, to "any Territory or other place over which the United States have exclusive jurisdiction." The meaning of the terms "polygamist" or "person cohabitating," with reference to the restriction as to voting, has been fully settled by the United States Supreme Court in *Murphy v. Ramsey*. (114 U. S., 39; 29 L. C. P., 47.)

This was an action for damages sustained by reason of being deprived, under this section, of the right to vote in the Territory of Utah; and among other things the court held:

The requirements of the eighth section of the act, in reference to a woman claiming the right to vote, are that she does not, at the time she offers to register, cohabit with a polygamist, bigamist, or person cohabiting with more than one woman. * * * Upon this construction the statute is not open to the objection that it is an ex post facto law. It does not seek in this section and by the penalty of disfranchisement to operate as a punishment upon any offense at all. * * * The disfranchisement operates upon the existing state and condition of the person, and not upon a past offense. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or a polygamist, or is then actually cohabiting with more than one woman. * * * So that, in respect to those disqualifications of a voter under the act of March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecution for crime.

In respect to the fact of actual cohabitation with more than one woman, the objection is equally groundless, for the inquiry into the fact, so far as the registration officers are authorized to make it, or the judges of election, on challenge of the right of the voter if registered, are required to determine it, is not, in view of its character as a crime, nor for the purpose of punishment, but for the sole purpose of determining, as in case of every other condition attached to the right of suffrage, the qualification of one who alleges his right to vote. It is precisely similar to an inquiry into the fact of nativity, of age, or of any other status necessary by law as a condition of the elective franchise.

The principles which apply to eligibility as a voter must apply to eligibility to office, as they are in the same section and the same language is employed as to each, and in order to be affected by the disqualification prescribed by this section, a person must be a polygamist or unlawfully cohabiting within the meaning of the section, "at the time" of entering upon the office. It is not enough to show that at some former

period Mr. Roberts was a polygamist or unlawfully cohabiting, as the disfranchisement does not operate "upon a past offense." It would have been entirely competent for Roberts to have taken himself from under the operation of this section while Utah was still a Territory, simply by ceasing to be a polygamist or cohabiting, or by moving into a State, as the "disfranchisement" operates upon "the existing state and condition of the person" only. In other words, the offense must be continuous. The offense and the disqualification are coterminous.

There is a further legal proposition, too well settled to require the citation of authority, and that is, no statute can operate, either directly or indirectly, extra-territorially. The statute in question does not undertake to.

The offense of polygamy and unlawfully cohabiting is localized by the statute. The provision is not general. No polygamist or person thus cohabiting "anywhere, without any restriction as to place," is not the language; on the other hand the prohibition is confined to a specified locality. No polygamist or any person thus cohabiting; where? "In any Territory or other place over which the United States have exclusive jurisdiction." The United States had no power to make the prohibition apply to any other place, and did not attempt it. The offense and the place defined must coexist. He must be a polygamist or person unlawfully cohabiting in "any Territory," or the statute does not apply. The statute applies only to residents of the Territory.

In the light of these propositions let us analyze the case as it is.

Mr. Roberts presents himself as a member-elect of this House. It is objected that he is disqualified, under this section, as a polygamist or person unlawfully cohabiting. The disqualification must exist at the time of his becoming a member. But since January, 1896, he has resided in the State of Utah, and this statute has not since then operated upon him, and does not now operate upon him. It can not, therefore, now disqualify him. The conditions of offense and place required by the statute to coexist do not coexist in his case, and therefore the statute does not apply. In other words, it is said he is ineligible. Why? Because there is a statute of the United States which says that no polygamist or person unlawfully cohabiting, in "any Territory" is eligible, and he is a polygamist or person thus cohabiting. It is a complete answer to say, "while I am a polygamist I am not such in 'any Territory.'"

While the penal provisions of the Edmunds Act are in full force in "any Territory," it would not for a moment be contended that Mr. Roberts would be liable to prosecution thereunder since January, 1896. Why? Simply because since that time he has committed no crime within "any Territory," as all of his acts have been in the State of Utah. A fortiori, the disqualifying provisions do not apply to him, as they do not even "operate as a punishment upon any offense at all." The moment Utah became a State, he, living in Utah, became a resident of the State, and one of the indispensable elements of the condition to which the disqualification attaches—residence within "any Territory"—ceased to exist, and the disqualification ceased to apply. The offense of polygamy or unlawful cohabitation in "any Territory" and the disqualification were no longer coterminous. He is now doing no act in "any Territory" to which the disqualification applies, and therefore, as to him, it does not exist.

It is true that while Utah was a Territory Roberts was unlawfully cohabiting, and the disqualification existed, and his status was then that of ineligibility, and therefore, it may be suggested, it continues. But this would make the disqualification the result of a past offense,

and the law says that it "operates upon the existing state and condition of the person, and not upon a past offense." It does not "operate as a punishment" at all, all of which it clearly would do if the supposition were correct.

If the disqualification attaches to Roberts by reason of acts committed in Utah, the State, then the act would be operating extraterritorially, outside of "any Territory" to which by its specific terms it is expressly confined. The fact that Roberts still resides in the same place where he resided in 1895, though Utah is now a State, but then was a Territory to which the law applied, undoubtedly is the cause of some confusion of thought. It is clear that his legal rights are precisely the same as though since 1896 he had been residing in Maine, and had been elected to Congress from that State. It would not be contended that this act could have any application to him in such case to affect his present status, as it never operated there. No more has it in Utah since January, 1896.

It seems to us beyond question that this act does not now apply to Mr. Roberts. Then there is no law having any application to this case, by which the attempt is made to add anything to the Constitutional qualifications. This House, by its independent action, can not make law for any purpose. The adding by this House, acting alone, of a qualification not established by law would not only be a violation of both the Constitution and the law, but it would establish a most dangerous precedent, which could hardly fail to "return to plague the inventor." You might feel that the grave moral and social aspects of this case allowed you to—

Wrest once the law to your authority
To do a great right, do a little wrong.

But what warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House with other standards of morality and propriety, which will create other qualifications with no rightful foundations, that, in the heat and unreason of partisan contest—since there will be no definite standard by which to determine the existence of qualifications—will add anything that may be necessary to accomplish the desired result? Exigency will determine the sufficiency. It would no longer be a government of laws, but of men. To thus depart from the Constitution, and substitute force for law, is to embark upon a trackless sea, without chart or compass, with almost a certainty of direful shipwreck.

It is contended that if all other reasons assigned for exclusion are found to be insufficient, as we believe they are, still Mr. Roberts should be excluded, upon the alleged ground that, by virtue of the enabling act, a compact now exists between the United States and Utah which has been violated by the election of Roberts to Congress, and that the State can be in this manner punished for such breach of the compact. Compact is synonymous with contract. The idea of a compact or contract is not predicable upon the relations that exist between the State and the General Government. They do not stand in the position of contracting parties. The condition upon which Utah was to become a State was fully performed when she became a State. The enabling act authorized the President to determine when the condition was performed. He discharged that duty, found that the condition was complied with; and that condition no longer exists.

What did Congress require by the enabling act? Simply that "said convention shall provide by ordinance irrevocable," etc., and the con-

vention did in terms what it was required to do. It was a condition upon the performance of which by the "convention" the admission of Utah depended. Its purpose accomplished, its office is gone, and as a condition it ceases to exist. No power was reserved in the enabling act, nor can any be found in the Constitution of the United States, authorizing Congress, not to say the House of Representatives alone, to discipline the people or the State of Utah, because the crime of polygamy or unlawful cohabitation has not been exterminated in Utah. Where is the warrant to be found for the exercise of this disciplinary, supervisory power? This theory is apparently evolved for the purposes of this case; is entirely without precedent; and has not even the conjecture or dream of any writer or commentator on the Constitution to stand upon.

FOURTH.

If it be thought that the case of Matteson determines that this House has no right to expel Mr. Roberts, we can not see how that fact, if it be a fact, has any legitimate tendency to establish the existence of a legal disqualification. But the Matteson case, in our judgment, does not warrant such an inference. Matteson was charged with inciting parties to corrupt the House, and with slandering the House by charging that a large number of members had pledged themselves not to vote for measures granting money or lands, unless they were paid for it. Upon these charges a resolution for his expulsion was pending in the Thirty-fourth Congress, and was about to be adopted, when he prevented further action by resigning. Meanwhile, and before the hearing by the committee, he had been elected to the Thirty-fifth Congress. In the Thirty-fifth Congress a resolution reciting these facts and declaring Matteson expelled was, after a long debate, referred to a committee, of which Mr. Seward, of Georgia, was chairman.

The debate discloses that the principal ground relied upon in opposition to the resolution, was that proceedings for expulsion were analogous to a criminal prosecution at common law, and that Matteson, having in effect been once punished by the Thirty-fourth Congress, could not properly be punished a second time for the same offense. In this respect the facts are not parallel to Mr. Roberts's case, as it appears that the offense with which he is charged is still continuing. The committee recommended the adoption of a resolution "That it is inexpedient to take further action in regard to Orasemus B. Matteson." The whole subject was afterwards laid on the table by a vote of 96 to 69, and this ended the action of the House.

Mr. Seward, in urging the adoption of the recommendation, incorrectly stated the action of the Senate in the Smith case in 1808. Smith was indicted for treason in Virginia, as an accomplice of Aaron Burr. Mr. Seward states: "Mr. Adams made a report to the Senate setting forth the crime for which the party was arraigned, and when the vote was taken there was not a sufficient number of the members of the Senate voted in favor of jurisdiction over the cause, and the Senate refused a conviction on the charge. They acted upon the principle that the criminal courts had jurisdiction when either the Constitution or laws of the United States were violated, because the facts established were clear, and the refusal to convict must turn upon the want of jurisdiction and power."

It was claimed in the Smith case that the Senate had no jurisdiction until after a conviction upon the indictment. The unanimous report of

the committee, made by John Quincy Adams, denied this proposition, and as to the power of expulsion stated the law as follows:

By letter of the Constitution the power of expelling a member is given to each of the two Houses of Congress, without any limitation other than that which requires a concurrence of two-thirds of the votes to give it effect.

There was no separate vote as to whether the Senate had jurisdiction. The report recommended a resolution expelling Smith. The vote, on its adoption, was 19 to 10, lacking only one of the necessary two thirds. When Mr. Seward stated that the "facts established were clear," and the case must have turned upon "want of jurisdiction and power," he presumed upon the lack of information on the part of the House, or himself was lacking in information, as the record discloses that the existence of the facts was bitterly contested, and page after page is devoted to their discussion; and a majority vote clearly would have been sufficient to determine the question of jurisdiction or power.

The Matteson case was in 1858. With the exception of a suggestion that a case had been decided in Massachusetts, the purport of which was not stated, no reference was made to a leading Massachusetts case. The opinion of the court in that case, an authoritative construction of the clause of the constitution under which they were acting, was written by Chief Justice Shaw, conceded to be one of the greatest judges that ever sat in any court in any land at any time. The report containing it was published in 1857. It is the only case which we have been able to find where the court has had occasion, with authority, to determine this precise question. The constitution of Massachusetts contained no provision authorizing the expulsion of a member of the house of representatives. Joseph Hiss was expelled by the house upon the ground that his conduct on a committee at Lowell "was highly improper and disgraceful, both to himself and to this body of which he is a member." This was not disorderly conduct in the house, and it is significant that the facts that made it "improper and disgraceful" were not disclosed by the case.

Hiss, after his expulsion, was arrested at the instance of one of his creditors on mesne process and committed to jail. He brought a petition for habeas corpus on the ground that he was a member of the House of Representatives, and as such privileged from arrest. This raised the precise question of the legality of his expulsion, and speaking through Chief Justice Shaw, the court, among other things, said:

The question is whether the House of Representatives have the power to expel a member.

After adverting to the fact that the Constitution did not in terms authorize expulsion, he says:

There is nothing to show that the framers of the Constitution intended to withhold this power. It may have been given expressly in other States, either *ex majori cautela*, or for the purpose of limiting it, by requiring a vote of more than a majority.

In the Constitution of the United States, it was given evidently "for the purpose of limiting it," as a two-thirds vote is required.

Again:

The power of expulsion is a necessary and incidental power, to enable the house to perform its high functions, and is necessary to the safety of the State. It is a power of protection. A member may be physically, mentally, or morally, wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent and disorderly, or in the habit of using profane, obscene and abusive language. It is necessary to put extreme cases, to test a principle.

If the power exists, the house must necessarily be the sole judge of the exigency which may justify and require its exercise.

After having fully examined the law and practice of Parliament, he says:

But there is another consideration, which seems to render it proper to look into the law and practice of Parliament, to some extent. I am strongly inclined to believe, as above intimated, that the power to commit and to expel its members was not given to the house and senate, respectively, because it was regarded as inherent, incidental, and necessary, and must exist in every aggregate and deliberative body, in order to the exercise of its functions, and because without it such body would be powerless to accomplish the purposes of its constitution; and therefore any attempt to express or define it would impair rather than strengthen it. This being so, the practice and usage of other legislative bodies, exercising the same functions, under similar exigencies; and the reason and grounds, existing in the nature of things, upon which their rules and practice have been founded; may serve as an example and as some guide to the adoption of good rules, when the exigencies arise under our constitution.

But independently of parliamentary custom and usages, our legislative houses have the power to protect themselves, by the punishment and expulsion of a member.

“It is urged that this court will inquire whether the petitioner has been tried. But if the House have jurisdiction for any cause to expel, and a court of justice finds that they have in fact expelled—”

He then held that their action was conclusive, and dismissed the petition. (*Hiss v. Bartlett*, 3 Gray, 468.)

It is instructive on this point to note that this paragraph of the Constitution, as originally drawn, read:

Each house may determine the rules of its proceedings; may punish its members for disorderly behavior; and may expel a member;

making three distinct clauses separated by semicolons.

This extract from the records of the debates in the Federal Convention shows clearly why the two-thirds provision was inserted in the expulsion clause:

Mr. Madison observed that the right of expulsion (article 6, section 6) was too important to be exercised by a bare majority of a quorum; and, in emergencies of faction, might be dangerously abused. He moved that “with the concurrence of two-thirds,” might be inserted between “may” and “expel.”

Mr. Randolph and Mr. Mason approved the idea.

Mr. Gouverneur Morris. This power may be safely trusted to a majority. A few men, from factious motives, may keep in a member who ought to be expelled.

Mr. Carroll thought that the concurrence of two-thirds, at least, ought to be required.

On the question requiring two-thirds, in cases of expelling a member, ten States were in the affirmative; Pennsylvania divided.

Article 6, sec. 6, as thus amended, was then agreed to, *nem con.* (Madison Papers, Vol. V, p. 406.)

While we think this *Hiss* case establishes beyond successful controversy the power of expulsion as discretionary and unlimited, it is proper to note that no decided case or elementary writer militates against it. We give all that we have found on the question.

In discussing this question, the court, in *State v. Jersey City* (25 N. J. L., 539), said:

The power vested in the two Houses of Congress by the Constitution, article 1, section 5, paragraph 2, is in different phraseology; it is, that “each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.” Under this power, the Senate in 1797 expelled a member of that body for an offense not committed in his official character as a member, nor during a session of Congress, nor while the member was at the seat of Government. (*Blount’s case*, *Story’s Commentaries on the Constitution*, ch. 12, sec. 836.) But it is not clear that the power to expel is limited by the Constitution to the cause of disorderly behavior.

Evidently without having in mind the accurate use of the term "qualification" as used in the Constitution, the court, in *State ex rel. v. Gilmore* (20 Kansas, 554), said:

The Constitution declares (art. 2, sec. 8) that "Each House shall be judge of the elections, returns, and qualifications of its own members." This is a grant of power, and constitutes each House the ultimate tribunal as to the qualifications of its own members. The two Houses acting conjointly do not decide. Each House acts for itself, and by itself; and from its decision there is no appeal, not even to the two Houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time and at all times during the term of office, each House is empowered to pass upon the present qualifications of its own members.

Story says:

And as a member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamor, the power to expel for very aggravated misconduct was also indispensable, not as a common, but as an ultimate redress for the grievance. But such a power, so summary and at the time so subversive of the rights of the people, it was foreseen, might be exerted for mere purposes of faction or party, to remove a patriot or to aid a corrupt measure; and it has, therefore, been wisely guarded by the restriction that there shall be a concurrence of two-thirds of the members to justify an expulsion. * * *

In July, 1797, William Blount was expelled from the Senate for "a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator." The offense charged against him was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British Government among the Indians. It was not a statutable offense, nor was it committed in his official character; nor was it committed during the session of Congress, nor at the seat of government. Yet, by an almost unanimous vote he was expelled from that body; and he was afterwards impeached (as has been already stated) for this, among other charges. It seems, therefore, to be settled by the Senate, upon full deliberation, that expulsion may be for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Senator. (Story on the Constitution, vol. 1, p. 607.)

Paschal states:

It seems to be settled that a member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a member. (Blount's Case, 1 Story Const., sec. 838; Smith's Case, 1 Hall's L. J., 459; Brook's Case, for assaulting Senator Sumner in the Senate Chamber, for words spoken in debate.) It extends to all cases where the offense is such, as in the judgment of the House, unfits him for parliamentary duties. (Paschal's Annotated Constitution, p. 87, par. 49.)

It has not yet been precisely settled what must be the disorderly behavior to incur punishment, nor what kind of punishment is to be inflicted; but it can not be doubted that misbehavior out of the walls of the House or within them, when it is not in session, would fall within the meaning of the Constitution. Expulsion may, however, be founded on criminal conduct committed in any place, and either before or after conviction in a court of law. (Rawle on the Constitution, 2d ed., 47.)

Cooley is specific:

Each House has also power to punish members for disorderly behavior, and other contempts of its authority, as well as to expel a member for any cause which seems to the body to render it unfit that he continue to occupy one of its seats. This power is generally enumerated in the Constitution among those which the two Houses may exercise, but it need not be specified in that instrument, since it would exist whether expressly conferred or not. It is "a necessary and incidental power to enable the House to perform its high functions, and it is necessary to the safety of the State. It is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language." And, "independently of parliamentary customs and usages, our legislative houses may have the power to protect themselves by the punishment and expulsion of a member," and the courts can not inquire into the justice of the decision, or even so much as examine the proceedings to see whether or not the proper opportunity for defense was furnished. (Cooley's Constitutional Limitations, pp 159, 160.)

Since there has been repeated occasion to take steps against members of each House under each of these two clauses, and since the majority has never taken this standpoint, it may now be regarded as finally settled that that interpretation is correct which is the broader, and at the same time, according to ordinary speech, unquestionably the more natural one. Both Houses of Congress must have been granted every power needed to guard themselves and their members against any impropriety on the part of a member, and to preserve their dignity and reputation among the people. It is wholly for them to say what conduct they are to regard as dishonorable enough to require expulsion. An appeal from their decision lies only to the court of public opinion, a court which brings in its verdict at the elections. (Von Holst's Constitutional Law of the United States, 102.)

The power of expulsion is unlimited, and the judgment of a two-thirds majority is final. (Pomeroy on Constitutional Law, p. 139, 1895.)

It seems necessary also to remark, that a member may be expelled, or discharged from sitting, as such, which is the same thing in milder terms, for many causes, for which the election could not be declared void. (Cushing, Law and Practice Legislative Assemblies, p. 33, sec. 84.)

The power to expel a member is naturally and even necessarily incidental to all aggregate, and especially all legislative bodies; which, without such power, could not exist honorably, and fulfill the object of their creation. In England this power is sanctioned by continued usage, which, in part, constitutes the law of Parliament. (Ibid., p. 251, sec. 625.)

Blount was expelled from the Senate for an offense inconsistent with public duty, but it was not for a statutory offense, nor was it in his official character, nor during the session of Congress, nor at the seat of government; the vote of expulsion was 25 to 1.

The motion to expel a member may be for disorderly behavior, or disobedience to the rules of the House in such aggravated form as to show his unfitness longer to remain in the House, and the cases above cited, as well as the reason of the provision, would justify the expulsion of a member from the House where his treasonable and criminal misconduct would show his unfitness for the public trust and duty of a member of either House. But expulsion, which is an extreme punishment, denying to his constituency the right to be represented by him, can only be inflicted by the concurrence of two-thirds of the House, and not by a bare majority only. (Citing Story on the Constitution, sec. 837; Tucker on the Constitution, p. 429.)

It has since been held by the House of Representatives that a member duly elected could not be disqualified for a cause not named in the Constitution, such as immorality, and that the remedy in such a case, if any, was expulsion. The distinction between the right to refuse admission and the right of expulsion upon the same ground is important, since the former can be done by a majority of a quorum, whereas expulsion requires the vote of two-thirds. The question can not be said to have been authoritatively decided. (Foster on the Constitution, p. 367.)

Mr. Foster's attention does not appear to have been directed to the case of *Hiss v. Bartlett*, as it is in point on his doubt if the doubt relates to the power of expulsion; he does not refer to it.

It is proper to observe that the determinations of the court and the opinions of eminent legal authors, unexcelled in reputation and learning, are entitled upon these propositions to great weight, as they are in every instance the result of careful, dispassionate, and disinterested research and sound reasoning, unaffected by considerations that must necessarily have been involved in legislative precedents. The two-thirds limitation upon the right to expel not only demonstrates the wisdom of the fathers, but illustrates the broad distinction between exclusion and expulsion.

A small partisan majority might render the desire to arbitrarily exclude, by a majority vote, in order to more securely intrench itself in power, irresistible. Hence its exercise is controlled by legal rules. In case of expulsion, when the requisite two-thirds can be had, the motive for the exercise of arbitrary power no longer exists, as a two-thirds partisan majority is sufficient for every purpose. Hence expulsion has been wisely left in the discretion of the House, and the safety of the members does not need the protection of legal rules.

It seems to us settled, upon reason and authority, that the power of the House to expel is unlimited, and that the legal propositions involved

may be thus fairly summarized: The power of exclusion is a matter of law, to be exercised by a majority vote, in accordance with legal principles, and exists only where a member-elect lacks some of the qualifications required by the Constitution. The power of expulsion is made by the Constitution purely a matter of discretion, to be exercised by a two-thirds vote, fairly, intelligently, conscientiously, with a due regard to propriety and the honor and integrity of the House, and the rights of the individual member. For the abuse of this discretion we are responsible only to our constituents, our consciences, and our God.

We believe that Mr. Roberts has the legal, constitutional, right to be sworn in as a member, but the facts are such that we further believe the House, in the exercise of its discretion, is not only justified, but required by every proper consideration involved, to expel him promptly after he becomes a member.

We recommend the following as a substitute for the resolution proposed by the committee:

Resolved, That Brigham H. Roberts, having been duly elected a Representative in the Fifty-sixth Congress from the State of Utah, with the qualifications requisite for admission to the House as such, is entitled, as a constitutional right, to take the oath of office prescribed for members-elect, his status as a polygamist, unlawfully cohabiting with plural wives, affording constitutional ground for expulsion, but not for exclusion from the House.

And if the House shall hold with us and swear in Mr. Roberts as a member, we shall, as soon as recognition can be had, offer a resolution to expel him as a polygamist, unlawfully cohabiting with plural wives.

C. E. LITTLEFIELD.
DAVID A. DE ARMOND.

LIBRARY OF CONGRESS



0 019 308 873 9